Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE STATE OF NEW YORK,

Petitioner,

—against—

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN, and BARBARA MANOCHERIAN, d/b/a FAME COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the heightened scrutiny analysis, including the "essential nexus" test, developed by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. Tigard*, 114 S. Ct. 2309 (1994), applicable in testing the validity of a statute of general application which regulates the use of property, and does not involve administrative imposition of an allegedly unconstitutional condition in exchange for a discretionary government benefit?

LIST OF PARTIES

In addition to the respondents listed in the caption, Lenox Hill Hospital, a New York not-for-profit corporation, was a named defendant and appeared in the state courts, while T. O'Connor, C. Rogers, D. Huczel, K. Moore, N. Kolan and I. Liebel, the employees of Lenox Hill Hospital who occupy the apartments in issue, were designated as defendants below, but did not participate or appear by counsel.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner State of New York respectfully prays that a writ of certiorari issue to review the opinion and judgment of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 84 N.Y.2d 385, 643 N.E.2d 479 (1994) and is reproduced in the appendix at 3a-45a. The opinion of the Appellate Division, First Department is reported at 196 A.D.2d 728, 602 N.Y.S.2d 93 (1st Dep't 1994) and is reproduced in the

appendix at 48a-61a. The opinion of the Supreme Court, New York County is reported at 154 Misc.2d 982, 586 N.Y.S.2d 726 (Sup. Ct. N.Y. Co. 1993) and is reproduced in the appendix at 62a-74a.

JURISDICTION

The judgment of the New York Court of Appeals was entered on October 20, 1994. By orders dated January 10, 1995 and February 13, 1995 (reproduced in the appendix at 1a and 2a, respectively), the Honorable Ruth Bader Ginsburg extended the time in which to file a petition for a writ of certiorari to February 17, 1995, and March 19, 1995, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Takings Clause of the Fifth Amendment of the United States Constitution and Chapter 940 of the Laws of 1984 which amended the Emergency Tenant Protection Act and the Rent Stabilization Law.

The applicable constitutional and statutory provisions are reproduced in the appendix at 75a-83a.

STATEMENT OF THE CASE

Statutory Framework

The authority of states and localities to adopt controls on rents and evictions, along with other pricing measures, is rooted in the traditional police powers reserved to the states. In New York City and State, rent regulation, in one form or another, has been maintained for over 50 years, based on

periodic reviews of vacancy rates and other housing market conditions which have shown that emergency conditions continue to exist.

While New York's regulations have included subsidiary provisions concerning tenure, habitability and related matters, their primary purpose is to limit the unreasonable escalation of rents in a rental housing market driven by scarcity. Legislative discretion to craft remedial measures of this sort has long been held to fit well within constitutional parameters.[1] This case involves a challenge to that assumption based, *inter alia*, on the purported applicability of this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) ("*Nollan*") and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) ("*Dolan*"), and the extent to which those decisions require the judiciary to review legislative determinations in this area.

At issue in this case is an amendment of the New York City Administrative Code, Chapter 940 of the Laws of 1984, which restored the right of not-for-profit hospitals to lease rent-stabilized apartments for the use of hospital employees. The protections afforded under the amendment were previously available under the City's Rent Stabilization Law, and were inadvertently eliminated when the Legislature enacted the Omnibus Housing Act of 1983, Chapter 403 of the Laws of 1983.

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[1] *See Block v. Hirsch*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Woods v. Cloyd W. Miller, Co.*, 333 U.S. 138 (1948); *Greene v. Mirabel*, 485 U.S. 983 (1988); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *see also* Bergman, *Property Law: Recent Developments in Rent Control and Related Laws Regulating the Landlord-Tenant Relationship*, 1989 Annual Survey of American Law 691.

See also Twentieth Century Association v. Waldner, 294 N.Y.S. 571, 63 N.E.2d 177 (1945) (sustained law establishing commercial rent control in New York City); *Teeval Co. v. Stern*, 301 N.Y. 346, 93 N.E.2d 884, *cert. denied*, 340 U.S. 876 (1950) (sustained New York's post-war rent control law).

New York's Rent Stabilization Law, Local Law 1969, N. 16 ("RSL") was enacted in 1969 in order to alleviate the housing crisis which persisted in New York City notwithstanding the existence of previously enacted rent control laws. The RSL was and continues to be based on findings and a declaration of emergency by the New York City Council, which states, *inter alia*, that:

> a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York . . . ; that *such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents*; * * * that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; preventive action by the council continues to be imperative; that *such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare*; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency * * * The council further finds that * * * such increases were being exacted under stress of prevailing conditions of * * * an acute housing shortage * * *.

N.Y. Unconsol. L. § 26-501 (Emphasis supplied).

The general object of this new law was to neutralize the effects of the housing shortage on rent increases by eliminating "unreasonable" rents and securing "fair" rents for both landlords and tenants. N.Y. Unconsol. L. § 26-510[h]. The law contemplated that fair rents would be established for a broad

class of tenants experiencing bargaining disadvantages, and drew no distinctions based on the income level of tenants or apartment location.[2] Thus, the central concern was to eliminate the effects of the housing shortage on rent levels, and not to guarantee permanent tenure or affordable rents for all affected tenants.

Between 1969 and 1983, the RSL was amended or modified on several occasions, as the Legislature attempted to address changing conditions and practices in the rental market. Of relevance here is the enactment in 1983 of the Omnibus Housing Act ("OHA") which, *inter alia*, sought to prevent non-resident tenants from exploiting the housing shortage by subletting their stabilized apartments to subtenants at a premium. Under the OHA, the tenant of record had to maintain the apartment as his primary residence in order to remain eligible for protection under the RSL, whereas, previously, the protections extended to subtenants as well.

Approximately four months later, the Legislature determined that further amendment of the RSL was necessary to remedy an unintended consequence of the OHA as it affected not-for-profit hospitals which were the tenants of record and which had sublet stabilized apartments to their employees. In order to protect these housing employee programs, which were jeopardized when landlords invoked the OHA in seeking to recover apartments sublet to hospital employees, the Legislature enacted Chapter 940 of the Laws of 1984.[3]

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[2] *See A Report to the Mayor on an Investigation into Rental Increases in the Non-controlled Housing Market, February, 1969*, authored by the City's Housing and Development Administration and Department of Consumer Affairs, which included the results of a survey that showed, *inter alia*, extraordinary rent increases in certain areas of New York City. "Geographically, tenant responses [to the survey] were concentrated in the traditionally high rent areas of the City, and most heavily in large newer buildings (less than 10 years old). *Id* at 2.

[3] During the four months between the effective date of the OHA and the adoption of Chapter 940, Lenox Hill Hospital alone faced sum-

Chapter 940 amended both the Emergency Tenant Protection Act (section 8625[11]) and the Rent Stabilization Law (section 26-504[a][1][f]) to provide that:

> For the purposes of this subparagraph [limiting application of each law to primary tenancies] where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants * * * *

L 1984, ch 940, §§ 1, 3. In addition, Chapter 940 exempted hospital tenants from time limitations in subletting, permitting subtenants to occupy apartments for the full term of the tenant's lease; placed limits on the landlord's right to refuse subtenants of hospital tenants; and granted to affected landlords a special rent increase to substitute for vacancy increases that might otherwise have been available to them (ch 940, §§ 2, 4). (78a-80a, 81a-82a) The effect of the OHA and Chapter 940 was to limit the abuse of private sublets, while allowing a legitimate, albeit small, class of tenants to provide housing for their employees at stabilized rents, as they had in the past.

Factual Background

In the early 1960's, Lenox Hill Hospital ("Lenox Hill") entered into leases covering 18 apartments (the "Apartments") in a building then owned by respondent landlord's predecessor in interest. The parties recognized that the Apartments would be used by Lenox Hill employees. (63a) The Apartments became subject to the Rent Stabilization Law in 1969, long before the landlord purchased the building in 1976. (49a) Until commencement of this action in 1991, the leases were consistently renewed by the parties, except that Lenox Hill

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mary proceedings involving approximately 100 apartments it had leased. *See* Letter of Allan C. Anderson, President of Lenox Hill Hospital to Yvonne Scruggs-Leftwich, Commissioner of New York State Division of Housing and Community Renewal, BILL JACKET, L 1984, ch 940, at 29.

discontinued leasing three of the original eighteen apartments. (63a)

The close accommodations provided by the Apartments allowed Lenox Hill to attract qualified medical personnel more easily, and gave it some assurance that these personnel would be available upon short notice in the case of medical emergencies requiring their presence. The Respondent is not the only landlord renting property to Lenox Hill for this purpose. Nor is Lenox Hill the only hospital to engage in the practice of renting groups of apartments for the use of its personnel.[4]

Proceedings Below

On September 25, 1991, the landlord brought this action in Supreme Court, New York County, seeking a judgment that Chapter 940 effected an unconstitutional physical and regulatory taking by depriving it, *inter alia*, of its reversionary interest in the Apartments.[5] By judgment entered January 8, 1993, the Supreme Court (Altman, J.), dismissed the complaint and declared Chapter 940 to be constitutional. (62a-74a)

The court concluded that the landlord had failed to meet its burden of rebutting the presumption that Chapter 940 was constitutional. In particular, it found that Chapter 940 did not

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[4] *See* Mailgrams in support of the amendment from the Dean of the Nursing School and the General Director of the Beth Israel Medical Center in New York City, which was faced with the same problem as Lenox Hill, BILL JACKET, L 1984, ch 940, at 36-7. The Bill Jacket also contains a letter from Lenox Hill Hospital to the New York State Commissioner of Housing and Community Renewal, urging her to support the legislation and stating, *inter alia*, that the Association of Hospital Housing Administrators, which represents twenty non-profit hospitals in "Metropolitan New York . . . actively sought the enactment of legislation to correct [the] problem" precipitated by passage of the OHA. *Id.* at 29.

[5] The landlord abandoned its claim of a physical taking after it was rejected by the trial court on the basis of this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522 (1992). (18a)

effect a regulatory taking under the standard applied by the New York Court of Appeals in *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 107, 542 N.E.2d 1059, 1065 (1989), a case which involved, *inter alia*, an unconstitutional condition, as well as a physical taking. *Seawall* relied upon this Court's decision in *Nollan* in holding that a government regulation may constitute a regulatory taking (1) if it denies an owner economically viable use of his property, or (2) if it does not substantially advance legitimate state interests. (67a)

The court held that Chapter 940 met the second prong of the *Nollan/Seawall* test because, in passing Chapter 940, the Legislature determined that the principal goal of the Rent Stabilization Law, *i.e.*, curbing oppressive conduct and profiteering by landlords, is advanced by providing protection to Lenox Hill and its employees, as is the goal of promoting the general health and welfare of the public. (72a)

With respect to the first prong of the *Nollan/Seawall* standard, the court held that the landlord had failed to demonstrate that it was denied an economically viable use of its property. (73a) The court rejected the landlord's claim that the Lenox Hill leases denied the landlord its reversionary interest in the Apartments, concluding that the landlord had not shown that the alleged deprivation was different than it would have been if the Apartments had been rented to individuals. (73a) Additionally, Chapter 940 did not cause the landlord to suffer economic harm because the statute allowed it to collect a 15% surcharge, which the landlord had collected, and which was available only because the tenant of record was a not-for-profit hospital. (73a)

The court also found that Chapter 940 had not interfered with the landlord's " 'distinct investment-backed expectations' " for it had purchased the building, "with knowledge of Lenox Hill's leases," long before enactment of the OHA. (73a) Moreover, the landlord's purpose then, as now, was to rent the apartments, not sell them.

On appeal, the Appellate Division, First Department affirmed on the basis of the lower court's decision. Two justices dissented. (48a-61a)

After hearing argument twice[6], the New York Court of Appeals, with two dissents, reversed the Appellate Division, observing that "the statute does not protect and benefit specific occupant sub-tenants, but rather enacts a subsidized housing regime for Lenox Hill Hospital's preferential allotment." (4a) Citing *Nollan*, the court held that Chapter 940 "suffers a fatal defect by not substantially advancing a closely and legitimately connected state interest." (4a) The court read *Nollan* as "placing [no] limitations or distinctions or classifications on the application of the essential nexus test," and further concluded that it was required to consider whether there was a close causal nexus even if the legislation had no economic impact. (10a)

In applying the test, the court recognized that protection against profiteering was at least one purpose of the rent stabilization system. Thus, it noted that ". . . the State intended to protect dwellers who could not compete in an overheated rental market, through no fault of their own . . . and to 'forestall profiteering, speculation and other disruptive practices.' " (5a, citations omitted) However, it proceeded to find that Chapter 940 was unconstitutional because it "does not contribute" to "[t]he central, underlying purpose" of the Rent Stabilization Law, which is to "ameliorate the dislocations and widespread lack of suitable dwellings." (12a) In particular, it cited the small number of units involved and the fact that the "apartments were subject to rent stabilization prior to the enactment and [would] remain so, irrespective of the outcome of this . . . dispute . . ." (12a) Accordingly, although the undeniable effect of Chapter 940 was to equalize the bar-

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[6] Two judges recused themselves before the first argument and were replaced by two members of the Appellate Division for the second argument.

gaining power between landlords and a class of tenants which the Legislature intended to protect, the court concluded that "Chapter 940 fails to *substantially or functionally* prevent or relate to excessive rents or profiteering." (12a) (Emphasis supplied). Instead, in the court's view, the statute bestowed a benefit which it repeatedly characterized as a subsidy. (4a, 10a, 12a) In addition, although the Apartments in issue will remain rent stabilized and simply be occupied by other tenants who are protected by the RSL, the court asserted that its decision flowed from a "proper adjudication," and "not a societal or policy preference of [the Court's] making." (12a)

The court also cited tenant security as an "overarching goal" of the RSL and determined that that goal was not served here because hospital employees may be "evicted" when their employment ends. (14a) The court did not acknowledge, however, that the "eviction" is not a function of the rental relationship, but results from termination of the employment relationship. Nor did it acknowledge that passage of Chapter 940 had prevented landlords from evicting Lenox Hill and its subtenants from apartments under the OHA.

Two judges filed separate dissents. Judge Levine concluded that "the majority has mistakenly applied a per se standard to an as-applied, purely regulatory takings claim," thereby disregarding the landlord's "utter failure to show that [it] suffered any economic loss to [its] investment . . ." (17a) or any impact on its investment-backed expectations. (17a, 21a) In his view, the court should have applied the standard set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), especially where, as here, the landlord challenged the application of "an economic regulation of a business enterprise."[7] (17a)

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[7] As evidence that the landlord had failed to satisfy its burden under *Penn Central*, Judge Levine cited, *inter alia*, the fact that the Apartments will remain stabilized if Lenox Hill is evicted, and the fact that the landlord purchased the building with knowledge that it was rent stabilized and subject to Lenox Hill's leases. (22a)

Based on his analysis of this Court's decision in *Dolan*, Judge Levine concluded that the close causal nexus test applied by the majority is limited to cases involving "the regulatory imposition of conditions of permanent physical occupation which would otherwise constitute a per se taking." (32a) However, until "the Supreme Court speaks definitively on whether its rule in *Nollan* and *Dolan* applies generally to all takings challenges," or the majority "reappraises its reading of *Nollan* as so applying," Judge Levine felt constrained by the Court of Appeals' earlier decision in *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (1989) to apply the test in this case.[8] In light of the "statutory framework" of the RSL, and the relevant legislative history, which "easily supports a legislative determination that non-profit hospitals have special needs" to be protected under the RSL (29a), he concluded that Chapter 940 survives heightened scrutiny.

Judge Levine faulted the majority for improperly selecting among the purposes of the rent laws in concluding that Chapter 940 failed to advance a legitimate state interest. "Even under the heightened judicial scrutiny standard," Judge Levine wrote, "a court is not permitted to pick and choose among express purposes of the legislation in employing the test of whether the requisite connection exists between the particular regulation and the problems the Legislature sought to ameliorate." (26a) Finding that, "at least one of the original primary purposes of the rent stabilization laws was to 'prevent speculative, unwarranted and abnormal increases in rents' and 'to forestall [landlord] profiteering, speculation and

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[8] In *Seawall*, the challenged ordinance imposed a moratorium restricting the conversion, alteration or demolition of single room occupancy buildings in New York City. While the court did not explicitly invoke the unconstitutional conditions doctrine in *Seawall*, it did find that the City's inclusion of a "buy out" option to the moratorium amounted to an unlawful form of "ransom". *Id.* at 113. *See Resolution Trust Corp. v. Diamond*, 18 F.3d 111, 121 (2d Cir. 1995), in which the Court of Appeals for the Second Circuit characterized the ordinance in *Seawall* as "coercive."

other disruptive practices,' " Judge Levine concluded that Chapter 940 "directly and undeniably serves the legislative protective and preventive goals with respect to abnormal rental increases and landlord profiteering". (26a) Judge Levine further found no justification for invalidating the law because of its purported underinclusiveness. (30a, 31a)

Judge Levine read the legislative history as supporting the conclusion that (a) exclusion of not-for-profit hospitals under the OHA was inadvertent (27a, 28a); (b) conditions that "impelled" the adoption of the RSL, *i.e.*, "apartment scarcity and artificially inflated rents—created a crisis for the hospitals by jeopardizing their ability to maintain adequate staffing" and (c) "the crisis was not unique to Lenox Hill" (28a), as the majority assumed.

Judge Ciparick also dissented, finding that "[t]he close causal nexus between Chapter 940 and the [Rent Stabilization Law] is that Chapter 940 implements a means of addressing the serious public emergency of housing people in New York City by continuing the protections of the [law] for particular tenancies already subject to rent stabilization". (36a) Judge Ciparick emphasized the fact that Chapter 940 reinstituted pre-existing protections and that the wisdom of this approach is a matter of legislative discretion. (37a) Judge Ciparick argued that "the majority impinges upon the State's prerogative to proportionally extend the scope of the [Rent Stabilization Law] consistent with its declaration of emergency, and its underlying goals which are legitimate state interests deserving protection". (40a)

As to the majority's claim that Chapter 940 benefits "one special class" (13a), Judge Ciparick wrote, "[b]y characterizing Chapter 940 as a statute that diverts and subverts the equal treatment regime, the majority not only ignores the realities of rent stabilization in the urban center, but tips the balance in favor of the party that already had unequal bargaining power. This is exactly the oppressive behavior the [Rent Sta-

bilization Law], as amended by Chapter 940, seeks to forestall." (43a)

Reasons for Granting the Writ

Review by this Court is warranted for two important reasons. First, the New York Court of Appeals, an influential state court of last resort, has, for the first time, applied the heightened scrutiny standard of review for regulatory takings claims, developed by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), to a case involving a general legislative determination which requires no dedication of any previously recognized property right, includes no element of forced physical intrusion on the property and imposes no condition on the granting of a discretionary government benefit. This application of these cases was in error.

Second, in assessing the legitimate state interest at issue, the New York Court of Appeals stretched beyond all previous applications, *Nollan*'s essential nexus test and *Dolan*'s requirement of "rough proportionality" (*Dolan*, 114 S. Ct. at 2318) by assessing more than simply the fit between the burden imposed on the affected owner and the public purpose to be served. Instead, notwithstanding its protests to the contrary, the court engaged in a quintessential legislative assessment of the effects of rent regulation, finding that such regulations subsidized certain tenants at the expense of landlords. In so doing, the court flatly overrode legislative findings that such regulations were necessary to forestall abnormal rent levels *and* to protect a particular class of the renting public from profiteering and eviction. Moreover, by describing the effects of such regulations as a form of subsidy, the court gave legal cognizance to a property interest which had never received such recognition during a lawfully declared housing emergency premised on abnormal market circumstances. The court thus substituted its judgment for that

of the Legislature in determining which class of persons should benefit from such protections. Even if the *Nollan/Dolan* nexus tests apply, which New York disputes, this finding had nothing to do with the connection between the purpose of the legislation and its functional impact.

ARGUMENT

THE COURT SHOULD CLARIFY WHETHER THE ESSENTIAL NEXUS AND ROUGH PROPORTIONALITY TESTS DEVELOPED IN *NOLLAN* AND *DOLAN* ARE APPLICABLE IN DETERMINING THE CONSTITUTIONALITY OF LEGISLATION OF GENERAL APPLICATION WHICH REGULATES THE USE OF PROPERTY

In a series of cases decided prior to its decision in *Nollan*, this Court developed a two-prong test for determining whether legislation affecting the use of property is unconstitutional under the Takings Clause of the Fifth Amendment. The Court held that such legislation will be sustained if it does not deny an owner the economically viable use of his land, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138, n.36 (1978), and it "substantially advance[s] legitimate state interests." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). In *Nollan*, and subsequently in *Dolan*, the Court interpreted the second prong of this test as requiring heightened scrutiny in cases which involve an exaction from the property owner in exchange for approval of a development permit.[9] Contrary to the assumption of the court below, however, this Court has yet to declare that heightened scrutiny is appropriate, much less required, where legislation of general

[9] The term "heightened scrutiny" has reference here to the close causal nexus/rough proportionality tests developed in *Nollan* and *Dolan*, and not the additional scrutiny which is required in determining whether an action substantially advances a legitimate state interest, as opposed to having a rational basis. *See Williamson v. Lee Optical of Oklahoma*, 348 U.S. 485, 488 (1955).

application is challenged as a regulatory taking. Nor should it do so.

In *Nollan*, this Court considered a facial challenge to an ordinance of the California Coastal Commission ("Commission") which required that a beachfront property owner grant an easement allowing the public to pass laterally across the beach portion of the property in exchange for a permit to build on the property. *Nollan*, 483 U.S. at 832. The asserted purpose of this condition was to foster visual access to the beach. The Court opined that had California demanded the easement outright, such action would have constituted a physical taking. *Id.* at 831. Further, the Court assumed, without deciding, that the Commission could deny a building permit in order to fulfill the governmental purpose. *Id.* at 836. The Court concluded that where a condition is imposed as a *quid pro quo* for granting a permit, it must serve the same purpose as a denial of the permit, in order to establish a sufficient "nexus" between the condition and the governmental purpose. *Id.* at 836-37. The Court determined that the condition imposed in *Nollan* lacked even a reasonable nexus with the stated purpose, and, therefore, held that the condition resulted in an unconstitutional taking. *Id.* at 838.

The facts in *Nollan* did not require the Court to determine how close a nexus must exist between the condition and the government's purpose in order to survive scrutiny. However, last Term, in *Dolan*, the Court answered this question, and held that once the threshold nexus has been established, the exaction placed on a development permit must be "roughly proportional" to the impact of the proposed development. In addition, the Court imposed the burden of proving the fit on the municipality and not on the challenger. *Dolan*, 114 S. Ct. at 2318.

In *Dolan*, a property owner sought permission from the city to replace her hardware store with a much larger facility and to pave a parking lot. The city conditioned approval of

Dolan's application on two exactions. First, to facilitate its flood control system, the city required Dolan to dedicate to the city the portion of her land falling within the floodplain of a nearby creek. *Id.* at 2314. Second, Dolan was required to dedicate a fifteen-foot-wide strip of land, adjacent to the floodplain, to permit the continued development of the city's pedestrian/bicycle pathway system. *Id.*

Invoking the "well-settled doctrine of 'unconstitutional conditions' " (*Id.* at 2317), the Court declared that the exactions could be upheld only if the burdens placed on Dolan's property were related to the costs that the development would impose on the community. *Id.* The Court first determined that an essential nexus existed between the state interest and the conditions because the city's effort to limit development in the floodplain and in the business district would further the legitimate public purpose of flood and traffic control. *Id.* at 2317-18. Only after reaching this conclusion did the Court turn to the question of the degree to which the city was required to tailor the exactions demanded to the impact of the proposed development. After examining the standards utilized by various state courts when faced with the same problem, the Court held that a "reasonable relationship" must exist between the conditions imposed and the projected effects of the development. *Id.* at 2318. However, the Court rejected the term "reasonable relationship" as too easily confused with the rational basis standard of scrutiny under the Equal Protection Clause, and chose the phrase "rough proportionality" to describe its new regulatory test. *Id.* The Court concluded that the city has the burden of justifying the required dedication by "mak[ing] some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 2319-20.

Both *Nollan* and *Dolan* concerned (1) coercive actions on the part of the regulators; (2) regulations that went so far as to impose a physical intrusion on the properties; (3) specific exactions, *i.e.*, an easement in *Nollan*, a pathway in *Dolan*, in

return for permits; and (4) individual, site-specific determinations made by adjudicative boards. Thus, the Court emphasized in *Dolan* that the "conditions imposed [by the city] were not simply a limitation on the use petitioner [Dolan] might make of her own parcel, but a requirement that she deed portions of the property to the city." 114 S.Ct. at 2316. The Court also distinguished between an "adjudicative decision to condition petitioner's application for a building permit on an individual parcel," in which case the city has the burden of justifying its decision, and an evaluation of "most generally applicable zoning regulations," where the burden of showing that the regulation is "arbitrary" rests on the party who challenges it. *Id.* at 2320, n.8.

Based on their facts, and the distinctions drawn by the Court, *Nollan* and *Dolan* would appear to establish a rule which is only applicable in testing the constitutionality of similar exactions. Indeed, this Court granted certiorari in *Dolan*, 114 S. Ct. 544 (1993), expressly because the Oregon Supreme Court had rejected the applicability of the *Nollan* "essential nexus" test to an exaction case. *Dolan*, 114 S.Ct. at 2316. *See also Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (1993), *cert. granted and judgment vacated*, 114 S. Ct. 2731 (1994), an exaction case, which this Court remanded to the California Court of Appeals, Second Appellate District Court, for adjudication consistent with *Dolan*.

This conclusion is supported by the fact that each of the state court cases examined by the Court in developing the rough proportionality standard concerned the requirement of a municipality that a developer dedicate land or pay a fee as a condition precedent for approval of the development.[10]

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[10] *See, e.g., Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964) (planning board's requirement of a dedication of land or payment of a fee as condition precedent for approval of subdivision held constitutional); *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966) (same); *but cf. Pioneer Trust & Savings Bank*

Notwithstanding the particular factual context in which *Nollan* and *Dolan* were decided, the New York Court of Appeals applied the heightened scrutiny standard of review to a case involving a general legislative determination which regulated the use of property and required no dedication of any previously recognized property right, contained no element of forced physical intrusion on the property, imposed no "unconstitutional condition" on the granting of a discretionary government benefit, and made no site-specific determination of any kind. Further, the Court of Appeals read the *Nollan/Dolan* tests as admitting of absolutely no exceptions, and, instead, as establishing "a principle for all property and land-use regulation matters," which it characterized as "a uniform, clear and reasonably definitive standard of review in takings cases." (9a-10a)

As Judge Levine pointed out in his dissent, however, even prior to *Dolan*, some commentators had interpreted *Nollan*'s requirement of a close causal nexus as applying only to the regulatory imposition of conditions of permanent physical occupation, citing Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1608-09; Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 949-50, n.146, 149; Tribe, *American Constitutional Law*, § 9-4, at 599, n.20 [2d ed.]. (32a) Moreover, the Court indicated in *Nollan* that the "adjective" in the "substantial" advancement prong allowed the Court "to be particularly careful. . . where the actual conveyance of property is made a condition to the

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v. Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (ordinance requiring subdivider to dedicate land to public use in return for approval struck down as a taking where problems sought to be remedied by statute were not caused by subdivision). *See also Simpson v. North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980) (same); *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (ordinance requiring cash payment in lieu of land dedication upheld); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976) (ordinance requiring dedication of land for parks as condition for subdivision approval upheld); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984) (same); *Call v. West Jordan*, 606 P.2d 217 (Utah 1979) (same).

lifting of a land-use restriction" (483 U.S. at 841), thereby suggesting that the "adjective" may be used more flexibly in other contexts.

While employment of the standards developed in *Nollan* and *Dolan* may be well suited to circumstances involving "some sort of individualized determination [where] the required dedication" (*Dolan*, 114 S. Ct. at 2319-20) involves a measurable portion of an established property interest, the extension of such exacting standards to legislation of general applicability is inappropriate. Significantly, throughout the development of these standards, the Court has been careful to recognize the need to permit some reasonable level of latitude so that legislatures can address complex public problems. As the majority observed in *Dolan*, " '[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the *general law*.' " 114 S. Ct. at 2316 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)) (Emphasis supplied). This case illustrates why application of the heightened scrutiny standard to general legislation of the kind at issue here is inappropriate.

Chapter 940 was enacted as part of a regulatory scheme which, historically, has been held to address a legitimate state interest. *See, e.g., Yee v. City of Escondido*, 503 U.S. at 519, 112 S.Ct. at 1529 ("We have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' " (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982))); *see also Pennell v. City of San Jose*, 485 U.S. 1, 12, n.6 (1987) (same); *Seawall Assocs. v. City of New York*, 74 N.Y.2d at 105, 542 N.E.2d at 1064 (court acknowledged that landlord-tenant regulations have been upheld which imposed restrictions "on existing tenancies where landlords had voluntarily put their properties to use for residential housing."). *See also* Justice Scalia's dis-

senting opinion in *Pennell* in which he explained the nexus between the anti-profiteering purpose of rent regulation and the elimination of excessive rents:

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate [the principle of not forcing some individuals to bear public burdens alone] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy . . . The same cause-and-effect relationship is popularly thought to justify emergency price regulation: When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs. . .
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> When excessive rents are forbidden, . . . landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness, *because they can plausibly be regarded as the source or beneficiary of the high rent problem.*

485 U.S. at 20, 22 (Emphasis supplied).

The principal purposes of Chapter 940, which amended New York's rent regulation scheme, were to further the RSL's goal of limiting profiteering in New York's troubled residential market and to restore protections to a group of tenants who, like all other consumers in this scarce market, remain vulnerable to excessive rents. Application of the standard of heightened scrutiny to such legislation, which merely amends the complex legislative scheme already in place, effectively precludes the Legislature from making necessary, incremental changes in response to altered conditions, as they occur.

The lengthy history of rent regulation in New York City has been characterized by three qualities, among others: (1) public purposes which include the forestallment of "profiteering, speculation, and other disruptive practices tending to produce threats to the public health, safety, and general welfare" in the unusual rental marketplace of New York City; (2) a degree of legislative creativity and experimentation in the regulation of rents in light of shifting economic circumstances throughout the State; and (3) efforts through the RSL to engage the participation of landlords and tenants in a rent stabilization scheme that provides for higher rent increases, while still limiting speculative profit. In the course of this history, the Legislature has necessarily distinguished among different classifications of housing, including: date of construction (L 1950, ch 250; New York City Loc L 1969, N. 16), geographic location (L 1950, ch 250), type of use (L 1959, ch 695), size (L 1953, ch 321), duration of owner occupancy (L 1953, ch 321), and other factors. On occasion the Legislature has modified the regulations and then regretted such amendment, subsequently reinstituting and even expanding prior restrictions (L 1971, ch 371; L 1974, ch 576).

It is significant that although the landlord here does not challenge all aspects of rent regulation, but merely a specific amendment, the Court of Appeals nonetheless held that the Legislature could not self-correct and adjust in a manner consistent with the initial stated purposes of the RSL. Thus, in this case, application of the heightened level of scrutiny inappropriately led the court to hold that the Legislature could not extend the protections of rent regulation to a particular class of tenants even though (a) the statute in issue "regulat[ed] rents in the relevant sense of preventing ren s that are excessive," *Pennell*, 485 U.S. at 22 (Scalia, J. dissenting), (b) the class was originally protected, and the landlord purchased the property with knowledge that it was subject to rent-stabilized leases held by the hospital, and (c) the class was inadvertently excluded from protection pursuant to a statute intended to

prevent an undesirable practice under the RSL, in which this class did not engage.

As the dissents correctly emphasized, the court below discounted these legitimate legislative considerations, finding that the State's interest in preventing excessive rents was not "substantially advanced," because, *inter alia*, in its view, the number of apartments affected was small, and they were subject to the RSL regardless of the outcome of this suit. The logical conclusion of this exacting analysis is that an amendment by the Legislature could not survive scrutiny unless the Legislature acted on a broader scale, *e.g.*, by extending protections to all corporate tenants, and/or extending the RSL protections to apartments which were previously not stabilized. Nothing in *Nollan* or *Dolan* suggests that this Court intended such a result when it adopted the heightened scrutiny test for determining whether a state interest has been "substantially" advanced. Yet this is what the landlord argued below, and what the Court of Appeals held.

Application of the heightened scrutiny standard to general legislative enactments which regulate the use of property may also lend itself to a degree of judicial oversight and discretion which this Court has long held to be inappropriate. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 486 n.16 (1987). Again, this case is illustrative. The court below not only felt free to pick and choose among the purposes of the legislation in examining its validity, but also, ultimately substituted its own judgment for that of the Legislature, concluding that only individuals should be permitted to enjoy the protections of rent stabilization, and not non-profit hospitals. Thus, it rested its holding on a determination that, when applied to not-for-profit hospitals, as opposed to other classes of tenants protected by the Legislature, the statute failed to produce fair rents and, instead, resulted in unconstitutional "subsidies." (4a, 10a,12a) It is evident that the court second-guessed the Legislature, notwithstanding its protests to the contrary, given the fact that the Apartments were, and will

remain, rent stabilized (12a, 17a), regardless of whether they are occupied by Lenox Hill's employees.

In finding that Chapter 940 allowed not-for-profit hospitals "to provide subsidized housing benefits to its chosen employees" (10a), the court ignored the fact that each affected apartment was subject to the RSL. Therefore, each apartment provided the landlord with a fair rent and a fair rate of return on its investment. Accordingly, Lenox Hill did not receive a "subsidy" from the landlord under the RSL, and the fact that Lenox Hill was able to provide what the court below called a "perk" to its employees is constitutionally irrelevant, especially since the Apartments will remain rent stabilized. (12a)

Chapter 940 is therefore different from the hardship provision challenged in *Pennell*, which allowed the City of San Jose to *reduce* a fair or reasonable rent otherwise payable to the landlord if a tenant could prove financial hardship. Although the Court found that the challenge in *Pennell* was premature because it did "not present a sufficiently concrete factual setting for the adjudication of the takings claim. . . ." (*Pennell*, 485 U.S. at 10), Justice Scalia, in his dissent, concluded that the San Jose ordinance resulted in an unconstitutional taking because it could result in *less* than a fair rent. *Id.* at 21.[11]

Application of the essential nexus/rough proportionality tests is further inappropriate here given the difficulty of mea-

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[11] Because the landlord in this case received and will continue to receive a fair rent under the RSL, regardless of whether Lenox Hill's employees occupy the Apartments, there was no basis for the lower court's conclusion that Chapter 940 resulted in an "unjustifiable burden draped disproportionately on the particular owners' shoulders." (10a) Chapter 940 specifically provided for a 15% "vacancy surcharge" as a substitute for vacancy increases that might otherwise have been available to landlords. (16a, 22a) As Judge Levine observed in his dissent, the lack of *any* evidence of an adverse impact on the landlord here "powerfully suggests" that there was little, if any, transfer of wealth from the landlord to the hospital lessee. (30a)

suring the required "fit" where there is no specific burden on the property owner which can be counterpoised against the interest advanced by the State. Indeed, the court below characterized the impact of the statute as "ephemeral" because the apartments were, and will remain, rent stabilized. Accordingly, although *Nollan*'s substantial advancement prong is distinct from the economic viability prong, where, as here, there has been no *per se* violation, such as a physical intrusion, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or restriction on disposition, *Hodel v. Irving*, 481 U.S. 704 (1987), the heightened scrutiny tests have no coherence.[12]

Finally, in light of the State's obligation to compensate for all takings, even those of a temporary nature, *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), the application of close scrutiny and the granting of compensatory relief in every situation where the impact of general legislation is imprecisely connected with some clear or explicit legislative goal could chill the willingness of state and local legislative bodies to consider a wide range of hitherto acceptable measures addressing public health, safety and welfare concerns. Overly broad application of such principles will lead to the obvious fear that at least some applications of general law may fail to meet the exacting scrutiny demanded by these standards and, in aggregate, may result in costly damage claims against the State, which

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[12] The court below assumed, without deciding, that Chapter 940 violated the landlord's reversionary interest, on the theory that the landlord had no expectation of recovering the Apartments because Lenox Hill is a corporation of perpetual existence. However, the court did "not consider [the issue] dispositive by itself in this case." (5a, 16a). In his dissent, Judge Levine correctly pointed out that the landlord's reversionary interest "is satisfied [*inter alia*,] by the ability to remove a financially or behaviorally irresponsible tenant. . . ." (25a) *See* 9 NYCRR § 2524.3. Moreover, in 1976, when the landlord purchased the building, Lenox Hill leased 18 apartments, but has since relinquished three. (36a) In addition, the rent stabilization system, including its tenure protections, is subject to an orderly termination if the citywide vacancy rate rises above 5%. N.Y. Unconsol. L. § 26-414; N.Y. Unconsol. L. § 8623[b].

could, in the long run, paralyze the ability of state and local governments to meet pressing environmental, land use and consumer welfare concerns.

For these reasons, the test to be applied to an amendment to a legislative enactment which regulates the use of property must be a more flexible standard than that applied to unconstitutional exactments. This case provides the Court with an opportunity to so hold.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

Dated: New York, New York
March 17, 1995

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. A-493

NEW YORK,

Petitioner,

—v.—

AMIR MANOCHERIAN, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended further to and including February 17, 1995.

/s/ Ruth Bader Ginsburg
Associate Justice of the
Supreme Court of the United States

Dated this 10th
day of January, 1995.

SUPREME COURT OF THE UNITED STATES

No. A-493

NEW YORK,

Petitioner,

—v.—

AMIR MANOCHERIAN, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended further to and including March 19, 1995.

/s/ Ruth Bader Ginsburg
Associate Justice of the
Supreme Court of the United States

Dated this 13th
day of February, 1995.

STATE OF NEW YORK
COURT OF APPEALS

1 No.135

AMIR MANOCHERIAN, et al,

Petitioner,

—v.—

LENOX HILL HOSPITAL, & c., et al.,

Respondents,
et al.,
Defendants

OPINION

This opinion is uncorrected and subject to revision before publication in the *New York Reports*.

Gary M. Rosenberg, for appellants.
Edward S. Kornreich, for respondents.
June Duffy, for Attorney General.
Pacific Legal Foundation, *amicus curiae*.

BELLACOSA, J.:

Plaintiffs, owners of several New York City rent stabilized apartments at issue here, seek summary judgment to declare Chapter 940 of the Laws of 1984 unconstitutional and related

relief. That enactment requires the owners to offer renewal leases to defendant-respondent, Lenox Hill Hospital, a not-for-profit hospital enterprise on the Upper East Side of Manhattan, for apartments occupied by some of the hospital's employees. Supreme Court and the Appellate Division upheld the validity of the statute and plaintiffs appeal as of right on constitutional grounds and a two-Justice dissent.

The precise issue for us to decide is whether Chapter 940 of the Laws of 1984 substantially advances a legitimate State interest, justifying the State's imposition of distinctive encumbrances and obligations on plaintiffs' private property rights. The statute purports to justify and accomplish its objective through an amendment tied to the general purposes of the Rent Stabilization Law (RSL) and Emergency Tenant Protection Act (ETPA). While these twin enactments co-exist to remedy a persisting emergency housing shortage, the particular statute under review perpetuates a small, privileged housing stock. In terms, actuality, and functional impact, the statute does not protect and benefit specific occupant subtenants, but rather erects a subsidized housing regime for Lenox Hill Hospital's preferential allotment.

We conclude that this legislation suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest (*see, Seawall Assocs. v City of New York*, 74 NY2d 92, 107, *cert denied* 493 US 976; *Rent Stabilization Assn. v Higgins*, 83 NY2d 156, 174, *cert denied* ___ US ___, 114 S Ct 2693 [6-13-94]; *see also, Nollan v California Coastal Commn.*, 483 US 825). Thus, we reverse the order of the Appellate Division.

I.

This long-standing dispute cannot be understood or resolved without some historical background and context (*see, 520 E. 81st St. Assocs. v Lenox Hill Hosp.*), 157 AD2d 138, *revg* 142 Misc 2d 723, *revd on other grounds* 77 NY2d 944). The rent stabilization system began in 1969 to ameliorate, over time, the intractable housing emergency in the City of

New York. The housing shortage was ascribed to "continued high demand, attributable in part to new household formation and decreasing supply" (Local L 1969, No. 16; *see*, Administrative Code of City of New York § 26-501). By regulating rents and providing occupants with statutory rights to tenancy renewals under rent stabilization—a "less onerous form of rent regulation"—the State intended to protect dwellers who could not compete in an overheated rental market, through no fault of their own (*Sullivan v Brevard Assoc.*, 66 NY2d 489, 494; *see, Braschi v Stahl Assocs. Co.*, 74 NY2d 201, 214 [concurring opinion]). The RSL has been maintained "to prevent uncertainty, hardship and dislocation," and to "forestall profiteering, speculation and other disruptive practices" (McKinney's Uncons Laws of NY § YY 51-1.0 [renum § 26-501]).

Unlike rent control, which places stricter price controls on owners and leaves many dwellings only marginally profitable, the State, in enacting rent stabilization, seeks to insure more balanced terms under which owners may apply for regulated rent increases and to protect primary occupants. Thus, in 1971, the Legislature exempted from rent stabilization regulation all housing accommodations not "occupied by the tenant in possession as his [or her] primary residence" (L 1971, ch 373). Similar language was incorporated into § 5(a)(11) of the ETPA of 1974 (*see*, L 1974, ch 576, § 4). The phrase "tenant in possession" included both the tenant of record and any subtenant residing in the regulated apartment. In 1983, however, the Omnibus Housing Act (OHA) amended Rent Stabilization Law § 26-504(a)(1)(f) to exempt from the RSL dwelling units "not occupied by the tenant, *not including subtenants or occupants*, as his [or her] primary residence" (L 1983, ch 403, § 41 [emphasis added]). Thus, under OHA, the named leaseholder had to occupy the apartment as a primary residence in order to qualify for a renewal lease. While the subletting of apartments was still permitted, Administrative Code § 26-511(c)(12) added that such tenants could not sublet units for more than a total of two years out of a four-year period, and only on the establishment of primary residency.

Next came Chapter 940 of the Laws of 1984 (L 1984, ch 940, codified at Administrative Code of City of NY § YY 51-3.0 [renum § 26-504]). It was enacted six months after the passage of Chapter 403 and exclusively exalts the renewal rights of not-for-profit hospitals, which had formerly subleased rent stabilized apartments to qualified hospital employees. Section 1 of Chapter 940 amended the non-primary RSL § 26-504(f), providing "[w]here a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodation by such hospital shall be deemed to be tenants." Thus, under Chapter 940, subtenants of the primary tenant, a nonoccupying, not-for-profit hospital, were deemed qualified tenants in specific contradiction of the general purport of the 1983 OHA reforms. Chapter 940 further grants not-for-profit hospitals the right to sublet apartments to affiliated employees without first obtaining an owner's consent and without requiring the hospital itself to maintain these apartments as a primary residence. Indeed, unlike any other regulated tenants, all of whom are authorized to sublet for only two out of every four years, the sublets by the not-for-profit hospital to its selected and variable employees is durationally unrestricted and open-ended. This is a unique and additional preference accorded no one else similarly situated. Moreover, the hospital's special privileges last for as long as its unilaterally-controlled corporate existence.

The legislative history of Chapter 940 reveals that Lenox Hill Hospital was the principal agent in urging the amendment (*see*, Senate Debates, S. Bill No. 9983, June 28, 1984 ["(t)his bill has been introduced at the request of Lenox Hill Hospital in New York City * * * (and i)ts purpose is to enable Lenox Hill to have the right to renewal leases"]). The salutary motivation was the preservation of safe, convenient, affordable housing for hospital staff (*see*, Governor's Bill Jacket, Letter from Lenox Hill Hospital [dated 7-27-84,] at 29). The primary and real beneficiary of this legislation, however, is Lenox Hill Hospital, not actual dwellers. The latter are only incidentally benefitted and may be evicted under the exclu-

sive control or at the whim of their employer, Lenox Hill Hospital, to which the Legislature transferred significant, distinctive, apartment ownership prerogatives without its having to endure the burdens and costs of ownership.

The affected apartment owners sued, believing that Chapter 940 could not constitutionally mandate that they provide Lenox Hill Hospital with these benefits under perpetual renewal leases. Supreme Court, in the phase of the litigation with which we are now dealing, dismissed the complaint. It held that Chapter 940 did not constitute a physical taking since the owners had previously and voluntarily opened their premises to the hospital's prime tenancy. Supreme Court also found no regulatory taking and concluded that Chapter 940 advanced the principal goal of the RSL (154 Misc 2d 982). The Appellate Division (196 AD2d 728), with two Justices dissenting, affirmed for the reasons stated by Supreme Court.

II.

Elementary and strong constitutional principles protect private property rights and govern takings of property for public use without just compensation. They evolved " 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " (*Penn Cent. Transp. Co. v New York City*, 438 US 104, 123, *quoting Armstrong v United States*, 364 US 40, 49; *Seawall Assocs v City of New York*, 74 NY2d 92, 101, *cert denied* 493 US 976, *supra*).

While there is no "precise mathematical calculation" for determining when an adjustment of rights has reached the point when "justice and fairness" requires that compensation be paid (*Dolan v City of Tigard*, ___ US ___, 114 S Ct 2309 [June 24, 1994]), in *Seawall Assocs. v City of New York* (*supra*), this Court implemented the doubled-edged test for determining whether a regulatory taking has occurred. We held that a "burden-shifting regulation" will constitute a taking "(1) if it denies an owner economically viable use of his [or her] property, *or* (2) if it does not substantially advance

legitimate State interests" (*id.*, at 107, citing *Nollan v California Coastal Commn.*, 483 US 825, 834, *supra*; *see also*, *Agins v Tiburon*, 447 US 255, 260). Failure to measure up to either criterion can invalidate a governmental incursion or encumbrance on private property rights (*see*, *Seawall Assocs. v City of New York*, *supra*; *Lucas v South Carolina Coastal Council*, ___ US ___, 112 S Ct 2886, 2894; *Nollan v California Coastal Commn.*, *supra*; *Keystone Bituminous Coal Assn. v DeBenedictis*, 480 US 470, 485, 495; *Armstrong v United States*, 364 US 40, *supra*). We are governed by this framework and discern no analytical basis or precedential authority to drop below this floor of constitutional protection for property owners or to alter well-established substantive and procedural rubrics and guidance in this complex field. In particular, we are satisfied that even if the economic impact aspect of this test (*see, Hodel v Irving*, 481 US 704, 714) were not to be satisfied, that feature alone could not defeat the owners' interests and claims in a controversy such as this, without consideration and fulfillment of the substantial State interest and close causal nexus prong of the governing test, even as to regulatory takings.

This Court also recently expressed the view that the substantial State purpose for such legislation must be bound by a "close causal nexus" to survive scrutiny (*see*, *Rent Stabilization Assn. v. Higgins*, 83 NY2d 156, 174, *cert denied* ___ US ___, 114 S Ct 2693 [6-13-94], *supra*; *see also*, *Dolan v City of Tigard*, ___ US ___, 114 S Ct 2309, supra). The precedents, State and Federal, thus establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause (*see*, Kaye, *Dual Constitutionalism in Practice and Principle*, February 1987 Cardozo Lecture, reprinted in 42 The Rec of The Assoc of the Bar of the City of New York 285, 289, 293, 294; *see also*, Brennan, *Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 NYU L Rev 535, 550 [1986] [the Federal Bill of Rights creates "a federal floor of protection"]).

While the typical taking occurs when the government acts to physically intrude upon private property, governmental regulations which limit owners' rights to possess, use or dispose of property may also amount to a "taking" of the affected property (*see, e.g., Agins v Tiburon*, 447 US 255, *supra*; *Nectow v City of Cambridge*, 277 US 183, 188; *Seawall Assocs. v City of New York*, 74 NY2d 92, 101, *cert denied* 493 US 976, *supra*). We held in *Seawall* that the challenged local law effected a regulatory taking and was unconstitutional because the burdens imposed on owners did not substantially advance the stated public aim of alleviating homelessness. The combined effect on the instant case of these principles gains inexorable momentum from the twin temples of the supremacy clause flowing from pertinent United States Supreme Court precedents and the *stare decisis* import of our own decisions.

The differing views of the members of the Court in this case derive principally from varying interpretations of governing precedents. As to Judge Ciparick's dissenting opinion, the difference is essentially one of application, but as to Judge Levine's, it is a profound difference from the Majority as to the understanding and interpretation of what the many governing precedents say and mean. Judge Levine's dissent discounts *Seawall* and casts unfortunate uncertainty on the governing precedents and principles, while the Majority is more confident as to the meaning and application of the governing law (*compare, Simpson v Loehmann*, 21 NY2d 305, 314 [Breitel, J., concurring opn]).

For example, there is no basis in *Nollan* itself for concluding that the Supreme Court decided to apply different takings tests, dependent on whether the takings were purely regulatory or physical. The Court promulgated a principle for all property and land-use regulation matters. A crucial threshold of analysis is that no taking occurs if a law "substantially advance[s] legitimate state interests" (*Nollan, supra*, at 834). In discussing the lack of a standard for determining what constitutes a "legitimate state interest," the Supreme Court specifically referred to non-physical regulatory takings cases

(*see*, *Nollan*, *supra*, citing *Agins v Tiburon*, 447 US 255, and *Penn Cent. Transp. Co. v New York City*, 438 US 104, *supra*). Further, the Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the "essential nexus" test. This suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases (*see generally*, Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings LJ 335, 351). Indeed, Justice Brennan, in dissent in *Nollan*, expressly attributed to the Majority's holding in *Nollan* an impact on all regulatory takings cases, stating that the Court's "exactitude * * * is inconsistent with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens" (*Nollan*, *supra*, at 842-843).

We conclude that Chapter 940 fails the test of substantially advancing a legitimate State Interest warranting the indeterminate and unjustifiable burden draped disproportionately on the particular owners' shoulders. That law, in the unusual development and circumstances of this case, must meet the constitutional safeguards on its own merits, not as an augmentation or complement to some generalized State interest found elsewhere in organic law or other statutes. Indeed, in significant respects, the particular statute contradicts two key goals of the RSL, to wit, occupant protection and eventual market redemption. These incongruities flow out of the transferral of power from a landlord to the employer of the actual occupants, and by the removal of the affected apartments entirely and permanently from marketplace availability or potentiality for other publicly interested or vying occupants at rent-stabilized rates.

The preservation of this Manhattan Upper East Side housing enclave for this privileged entity's benefit, albeit one engaged in a laudable and necessary eleemosynary health service function, cannot masquerade as general welfare legislation. Purporting to promote the general public welfare by enabling not-for-profit hospitals to continue to provide subsidized housing benefits to its chosen employees cannot sus-

tain the sweep and manner of the burden and confiscation effected against the few owners. Dissenting Justice Joseph P. Sullivan aptly framed the consequences as follows:

> A statutory interpretation which encourages the deployment of rent stabilized apartments in perpetuity as temporary dormitory space for an ever changing roster of hospital employees and promotes the displacement of these employees, some of whom may be long-term tenants, when they leave their employment does a disservice to rent stabilization's underlying purpose of protecting residential tenants from evictions during an acute housing shortage (196 AD2d 728, 732).

Lenox Hill Hospital, the State and our colleagues, Judges Levine and Ciparick, in their discrete dissenting opinions, urge that the requisite State interest is satisfied under the overall umbrella of the RSL and for the general health and welfare. We respectfully disagree. Judge Ciparick's dissenting opinion, in our view, does not give the holdings of the governing cases sufficient weight and import affecting the rationale and application we have advanced in the instant case. Judge Levine's approach, on the other hand, would seem to undermine *Seawall* or, *sub silentio*, place its precedential force in considerable doubt. Functionally, his analysis undercuts the legitimate State interest and close causal connection components of the well-established test. Moreover, the Majority has not, as Judge Levine asserts, adopted some variable of the standard governing tests or effected per se rules, applications or consequences (Dissenting opn, at 14).

The Supreme Court and this Court in the cited cases have ruled definitively in the fulfillment and exercise of an appropriate and necessary judicial review function, providing governing guidance for future cases, including this one. This traditional, fundamental, judicial role is not inimical to the prerogatives of the other Branches, but serves instead as the singular check and balance against governmental intrusion and overreaching (Ciparick, J., Dissenting opn, at 9). We, thus, resolve the controversy between the property owners

and their prime tenant, Lenox Hill Hospital, and thus settle the juridical relationship and rights as between them. The power equation should, therefore, not be characterized as between so-called greedy owners and needy dwellers. Rather, this case is about a one-dimensional financial award, subsidizing an employer which happens to be a non-occupying prime tenant and which wishes to avoid the concomitant burdens and responsibilities of ownership. Whatever consequences flow from our ruling, then, are the product of the law itself and its proper adjudication, not a societal or policy preference of our making.

The central, underlying purpose of the RSL is to ameliorate the dislocations and risk of widespread lack of suitable dwellings. Chapter 940 does not contribute to that desirable altruistic aim. It affects a tiny number of dwelling units. The effect of the statute is also quite ephemeral. These apartments were subject to rent stabilization prior to the enactment and will remain so, irrespective of the outcome of this long-standing dispute affecting a dwindling number of apartments, still in controversy in this litigation, with respect to the hospital's prime tenancy lease renewal entitlements. Accordingly, Chapter 940 fails to substantially or functionally prevent or relate to excessive rents and profiteering.

The realistic appraisal of Chapter 940 shows that it was sought and designed essentially to subsidize the non-profit hospitals special fringe benefit to some of its special health care employees. This common employer-employee dilemma has no legally or legitimately cognizable, causal relationship to the governmental intrusion on rights and entitlements due owners in the use and enjoyment of their properties in a rental market where demand intractably exceeds supply at affordable levels. Chapter 940 is really interposed as a special housing program, privately funded through those owners who happen to have previously rented to not-for-profit hospitals, like Lenox Hill Hospital.

The real goal of Lenox Hill and other arguably similarly situated not-for-profit hospitals is preserving a valuable perk for some of its health care workers. This has little to do with

a general State housing concern warranting Chapter 940's intervention. Rather, it sharply contradicts that indispensable legislative threshold and constitutional prerequisite. The fact that the State has acted through the "landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation', which can disproportionally burden particular individuals" (*Pennell v City of San Jose*, 485 US 1, 22; *see also*, *Penn Cent. Transp. Co. v New York City*, 438 US 104, 124, *supra*).

III.

The exception created by this challenged enactment to the primary, occupying tenancy entitlement is infirm for additional reasons. A proffered State interest, which by definition should serve and protect the general populace on a fairly and uniformly applied basis, should not be countenanced when, as occurs here, the statute instead benefits one special class for an essentially unrelated economic redistribution and societal relationship (*see*, *19th St. Assocs. v State of New York*, 79 NY2d 434). Moreover, the employer here is transformed into the *de facto* landlord and receives a benefit directly related to conserving its capital or operating expenditures. As a health care provider, it would otherwise have to recoup those costs by direct expense reimbursement formulas or charges, like others similarly situated, for the true, full cost of medical services rendered in its community. This statute thus diverts and subverts that equal treatment regime. It does not even really protect housing for the subtenant-employees as such, and certainly provides no benefit to the citizenry at large on a fair opportunity and equal access basis. Rather, it bestows a State-enacted indirect gift to a preferred supplicant, the non-occupying prime tenant, underwritten by the improperly burdened property owners. In this respect, Chapter 940 cannot escape the force of *19th St. Assocs. v State of New York* (79 NY2d 434, *supra*), a potent precedent like several others (*see*, *e.g.*,

Seawall, Higgins, Nollan, Agins), not fully appreciated as to their full import and impact in both dissenting expressions.

Part of the underpinning of the Hospital's and State's claim in this case rests on a belated assertion of a health care crisis in the City of New York. The Legislature declared no crisis in enacting this privileged exception. Also, such a generalization would precedentially countenance a myriad of favoritism experiments or supplicant demands or preferential entitlements to special classes of entities over the wider, appropriate and constitutionally authorized and recognized State interests of the general public.

We conclude that the peripheral and generalized State interests offered as justification for the regulatory mandates of Chapter 940 fail to sustain the legislation, as constitutionally required for such State action. They are not closely or legitimately connected to the long-established and recognized goals of the RSL and ETPA, which seek to ameliorate the emergency housing shortage. The regime of this statute, in significant functional respects, contradicts an essential tenet of housing protection, at the root of rent-controlled and rent-stabilized enactments. An overarching goal of the RSL and ETPA is to afford some measure of security to occupants so they do not lose their scarce dwelling space due to unilateral, oppressive activities from more powerful entities in the societal equation, whether they be landlords or employers or both. The insupportable contradiction in this statute is cogently demonstrated by its unabashed transfer to the corporate employer of greater eviction rights over its affiliated and disaffiliated employee subtenants than the owner is allowed to retain.

IV.

Appellants-owners also claim that Chapter 940 results in a regulatory wresting away of their reversionary property interests. Property attributes to any physical object include the rights "to possess, use and dispose" of the asset (*United States v General Motors Corp.*, 323 US 373, 378). It is well

established that even if only a single element of an owner's "bundle of property rights" is extinguished, there has been a regulatory taking (*see, Hodel v Irving*, 481 US 704, 716, *supra*; *see also, Seawall Assocs. v City of New York*, 74 NY2d 92, *supra*). Application of the *Seawall* analysis in that respect to the present case adds further support to our primary analysis and result that an unconstitutional taking occurs here under Chapter 940 (*see, Hodel v Irving*, 481 US 704, *supra*; *Koenig v Jewish Child Care Assn.*, 67 NY2d 955; *Rent Stabilization Assn. v Higgins*, 83 NY2d 156, 176, *supra*)—though we need not decide this issue on a stand-alone basis because we do not consider it dispositive by itself in this case. We respectfully submit that Judge Levine's dissenting opinion also misperceives and mischaracterizes the Majority's analysis and holding in the reversionary interest aspect of this case.

Because Lenox Hill Hospital has enjoyed a corporate existence since 1918, the enactment also confers a tenancy quite different in kind, degree and potential from the human, personal successorships countenanced in *Braschi v Stahl Assocs. Co.* (74 NY2d 201, 214, *supra*) and *Rent Stabilization Assn. v Higgins* (83 NY2d 156, *supra*; *cf., Sullivan v Brevard Assoc.*, 66 NY2d 489, *supra*). These cited successorships were narrowly recognized and permitted precisely because of the analytic-policy underpinning of averting personal evictions of real people. They are consistent with the anti-eviction goals of the ETPA and RSL. This statute is not. Yet, both dissents ignore the critical distinction.

We next turn to *Yee v City of Escondido* (___ US ___, 112 S Ct 1522), which does not compel a different result, despite Judge Levine's extensive reliance. *Yee* was a "physical occupation" takings case, not a regulatory type. More importantly, *Yee* dealt with an entirely different statutory scheme. In *Yee*, a group of mobile home park owners brought an action claiming that a local rent control ordinance, which applied to *all* mobile home parks in the municipality, constituted a *physical taking* because the local ordinance deprived the petitioners of all use and occupancy of their real property. *Yee* is addition-

ally distinguishable because the local law was general, not a targeted, narrow, special interest as with Chapter 940, and there was no allegation or proof submitted by the park owners that the local ordinance placed an inordinate burden on selected individuals which, "in all fairness and justice, should be borne by the public as a whole" (*Penn Cent. Transp. Co. v New York City*, 438 US 104, 123, *supra*). Moreover, although the Supreme Court refused to address the petitioners' regulatory taking claim, citing a Rule 14.1(a) violation, the Court stated that the regulatory claim did "not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property" (*Yee v City of Escondido*, *supra*, at 1532). Thus, *Yee* is more analogous to a constitutional challenge against the legislatively created rent control and rent stabilization as a whole, which we certainly do not have in this case and by no means does our ruling affect or diminish the general validity of those broad, longstanding protections and enactments.

Lenox Hill Hospital also urges that Chapter 940 assures an "economically viable rate of return" on the subject apartments to owners, since the statute provides for a 15% vacancy surcharge if there has been no vacancy rental increase within the prior seven years. The sweep of Chapter 940, however, goes well beyond that tendered balance wheel (*compare*, *Concrete Pipe and Prod. v Const. Laborers Pension Tr.*, ___ US ___, 113 S Ct 2264, 2291). The statute vests renewal rights in an entity of unlimited existence, a notion directly contrary to another goal of the RSL and ETPA—to free up apartments, fairly and appropriately, as soon as practicable (*see*, *Rent Stabilization Assn. v Higgins*, 83 NY2d 156, 176-177, *supra*; *Koenig v Jewish Child Care Assn.*, 67 NY2d 955, 958, *supra*). Lastly in this connection, the Court appears to be unanimous in rejecting Lenox Hill's assertion that plaintiffs are estopped from contesting the constitutionality of Chapter 940.

The sharply focused legal question under the controlling precedential and analytical principles may be reduced simply to whether the legislation is supported by a substantial State interest and close nexus. No amount of extensive and virtually

exclusive exploration of economic recalibration of the test, as an expectation for the future, can change that central controlling feature under reasonably clear precedents and principles. To take State action as with the challenged statute, the State must show a legitimate, substantial State interest that is closely, causally related to the action undertaken. The Constitution forbids State action by fiat, no matter the economic equation. Thus, by exercising the judiciary's constitutional duty to decide this case within appropriate precedential and judicial review templates, this Court concludes that the generalized presumption of constitutionality accorded to statutes cannot substitute for the fundamental defect in Chapter 940, to wit, no substantial advancement of a legitimate State interest and "close causal nexus" required for the challenged regulatory enactment to survive scrutiny (*see, Rent Stabilization Assn. v Higgins*, 83 NY2d 156, 173-174, *supra*).

Accordingly, the order of the Appellate Division should be reversed, with costs, and Chapter 940 of the Laws of 1984 declared unconstitutional and the case should be remitted to Supreme Court, New York County, for such further proceedings as may be necessary and appropriate to resolve rights and remedies among the parties to this litigation affected by the holding of this case.

LEVINE, J. (Dissenting):

I respectfully dissent.

In my view, the majority has mistakenly applied a per se standard to an as-applied, purely regulatory takings claim under the Just Compensation Clause of the Fifth Amendment here. In doing so, the majority disregards plaintiffs' utter failure to show that they suffered any economic loss to their investment in the New York City residential rentals market as a result of the application of Chapter 940 of the Laws of 1984 to their 100-plus units apartment building. This case presents essentially and realistically a takings claim challenge to an economic regulation of a business enterprise and, as such, economic analysis of the impact of the regulation is particu-

larly vital to achieving a just disposition of the case. Chapter 940, which merely restored to New York City non-profit community hospitals the protection of the Rent Stabilization Law of 1969 (RSL) and the Emergency Tenant Protection Act of 1974 (ETPA) they previously enjoyed, is completely consistent with and directly furthers basic purposes of the RSL and the ETPA and this Court should sustain its validity.

I.

Concededly and indeed as characterized by plaintiffs, the instant action is a challenge under the Just Compensation,or "takings" clause of the Fifth Amendment of the United States Constitution to Chapter 940 of the Laws of 1984 *as applied* to their ownership of an apartment building of over 100 units on the Upper East Side of Manhattan, 15 of which are leased to defendant Lenox Hill Hospital. Also, before this Court, plaintiffs have abandoned any claim that the tenant eviction protection restored to Lenox Hill under Chapter 940 constitutes a per se, physical taking, that is, statutory authorization for a physical occupation of their property (*cf., Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419, 426; *Seawall Assocs. v City of New York*, 74 NY2d 92, 102-106). Accordingly, this appeal is limited to an as-applied challenge to an alleged, purely regulatory taking.

In *Penn Central Transp. Co. v New York City* (438 US 104), the Supreme Court articulated the appropriate considerations and method of analysis by courts in reviewing such purely regulatory, as-applied taking challenges. First, the Court emphasized that the Just Compensation Clause, insofar as it extends to a regulatory taking, deals with disproportionate *economic* burdens unfairly imposed on a comparatively few individuals by government regulation, and that there is no simple litmus test to determine whether a given regulation constitutes a taking. "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that *economic injuries* caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons"

(*id.*, at 124 [emphasis supplied]). The Court in *Penn Central* cautioned "that government may execute laws or programs that adversely affect recognized *economic values*" without giving rise to a valid takings claim and that there are other instances where, although "government action caused *economic harm*, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes" (*id.*, at 124-125 [emphasis supplied]).

Thus, the Court in *Penn Central* directed that judicial review of a claimed as-applied regulatory taking entails "ad hoc, factual inquiries" in which notably important factors to be considered are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" (*id.*, at 124).

The Supreme Court in *Penn Central* also rejected a takings clause methodology later described as "conceptual severance"[1], i.e., the stratagem of dividing a unitary property into its various component physical segments or its various integral property interests and finding a taking because of the challenged regulation's impact on one physical segment or an individual property right. " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather on the character of the action and on the nature and extent of the interference with rights *in the parcel as a whole*" (*id.*, at 130-131 [emphasis supplied]).

Supreme Court decisions subsequent to *Penn Central*, including decisions authored by the Justices most sensitive to the property rights of owners in takings clause cases, confirm the continued validity of the *Penn Central* ad hoc analysis in as-applied regulatory taking cases, with its emphasis on iden-

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[1] *See*, Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*" (88 Colum L Rev 1667, 1674-1678 [1988]).

tifying the economic factors involved in the taking. Thus, in *Hodel v Irving* (481 US 704), Justice O'Connor characterized the *Penn Central* approach as a "framework for examining the question whether a regulation of property amounts to a taking requiring just compensation [which] is firmly established and has been regularly and recently reaffirmed" (*id.*, at 713-714). Chief Justice Rehnquist in *Pennell v City of San Jose* (485 US 1), declined to entertain a facial regulatory taking challenge to a rent control ordinance because it was impossible to ascertain the economic impact of the ordinance at that preliminary stage. "Given the 'essentially ad hoc, factual inquir[y]' involved in the takings analysis * * * the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the *consequences of that injunction in the ultimate determination of the rent,* does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here" (*id.*, at 10 [emphasis supplied]). And in *Lucas v South Carolina Coastal Council* (___ US ___, 112 S Ct 2886), Justice Scalia again affirmed that in the absence of a per se taking "we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and * * * the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally" (*id.*, at ___ n 8, 112 S Ct, at 2895 n 8).

The Supreme Court's emphasis on inquiring for economic loss in an as-applied regulatory takings claim follows directly from the very language of the takings clause itself in the Fifth Amendment, which authorizes all forms of governmental appropriation of private property for a public use, upon the payment of "just compensation" (US Const, Fifth Amend). As one scholar has pointed out, the "normative component" of the takings clause that "has predominated in modern cases" is the "protection of economic value"[2] (Manheim, *Tenant*

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[2] The takings clause also protects dominion interests, but this normative aspect more centrally pertains to per se, physical takings or where the claim is that a governmental condemnation of property violates the

Eviction Protection and the Takings Clause, 1989 Wis L Rev 925, 958). This is why "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken" (*United States v Causby,* 328 US 256, 261, *see also, Keystone Bituminous Coal Assn. v DeBenedictis,* 480 US 470, 516 [Rehnquist, Ch. J., dissenting] ["the question (whether a regulatory taking has occurred) is evaluated from the perspective of the property holder's loss rather than the government's gain"]).

The centrality of determining the extent of economic loss in a regulatory takings challenge was again stressed in *Keystone Bituminous Coal Assn.,* which held "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property" (*supra,* at 497). And in *Keystone,* the Court also insisted that the comparison is to be based upon the economic loss to the property as a whole (*id.*; *accord, Concrete Pipe and Prods. of California v Construction Laborers Pension Trust for S. California,* 508 US ___, ___, 113 S Ct 2264, 2290).

It follows from the foregoing that plaintiffs' minimum burden in order to establish an as-applied regulatory taking here was to show with a modicum of definiteness that they sustained some significant loss of value in their apartment building *as a whole* because of the application of Chapter 940. Indeed, our own precedents require a takings clause challenger to show with a high degree of definiteness the loss of value to the affected property caused by a regulatory taking (*see, Honore De St. Aubin v Flacke,* 68 NY2d 66, 76-77).

In the instant case, the sole evidence submitted by plaintiffs of any adverse economic impact of Chapter 940 on the value of their apartment building was the averment of one of the plaintiffs that the statutorily required renewals of the Lenox Hill leases prevented plaintiffs from exercising their vacancy rights under the RSL and ETPA, to "renovate and reconfigure the apartments to increase the fair market value and rent roll

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public use clause of the Fifth Amendment (*see, Hawaiian Housing Auth. v Midkiff,* 467 US 229).

of the building". It was not inadvertent that the only economic evidence of plaintiffs was this vague reference to the *possibility* of increasing rents and market value of the building through renovations. They concede that if Lenox Hill and its subtenants are evicted, the apartments will remain fully subject to rent stabilization, and any new tenants and their successor family members would enjoy the full protections of the RSL and ETPA for the indefinite future. Moreover, whatever loss in the fair market value of the building caused by plaintiffs' inability to increase rents through renovations of the 15 apartments leased to Lenox Hill would be offset by the increase in market value attributable to the periodic 15% increases in Lenox Hill's rents guaranteed under Chapter 940.

The other major economic factor mandated for consideration in an as-applied regulatory taking challenge is "the extent to which the regulation has interfered with distinct, investment-backed expectations" (*Penn Central Transp. Co. v New York City,* 438 US 104, 124, *supra*; *see also, e.g., Concrete Pipe and Prods. of California v Construction Laborers Pension Trust for S. California,* 508 US ___, ___, 113 S Ct 2264, 2291, *supra*; *Lucas v South Carolina Coastal Council,* ___ US___, ___ n 8, 112 S Ct 2886, 2895 n 8, *supra*; *Keystone Bituminous Coal Assn. v DeBenedictis,* 480 US 470, 493-495, *supra*). Plaintiffs purchased this apartment building in 1976, some 12 years after Lenox Hill first acquired leases in the building and seven years after the apartments became subject to rent stabilization. Uncontestably, Chapter 940 did not create any greater encumbrances upon the apartments leased to Lenox Hill than existed in 1976 when plaintiffs chose to invest in the New York City residential rentals market by acquiring the property. Thus, plaintiffs have totally failed to sustain their burden of establishing that Chapter 940 interfered with their investment-backed expectations (*see, Concrete Pipe and Prods. of California v Construction Laborers Pension Trust for S. California, supra,* at ___ 113 S Ct, at 2291-2292).

Plaintiffs' failure to show an economic loss as the result of the application of Chapter 940 should be fatal to their chal-

lenge. In *Goldblatt v Town of Hempstead* (369 US 590) the Supreme Court rejected a regulatory taking challenge because "there is no evidence in the present record which even remotely suggests that [enforcement of the regulation] will reduce the value of the lot in question" *(id.,* at 594; *see also, Prune Yard Shopping Center v Evans,* 447 US 74, 84 [Rehnquist, J.] ["[H]ere appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking' "]).

II.

The majority justifies its disregard of plaintiffs' failure to demonstrate any economic loss as a result of the application of Chapter 940 to their apartment building primarily on two grounds. One of those grounds is that, because Lenox Hill is a corporation with "unlimited existence", Chapter 940 permanently deprives plaintiffs of their reversionary interests, and this apparently is viewed as a per se taking. "[E]ven if only a single element of an owner's 'bundle of property rights' is extinguished, there has been a regulatory taking (sl opn p 16). The pertinent Supreme Court decisions hold to the contrary. Plaintiffs voluntarily chose to enter the heavily regulated New York City residential rentals market when they purchased the building in 1976, and they admit that if the Lenox Hill leases are permitted finally to expire, the apartments in question will remain indefinitely in that market. Moreover, despite the application of Chapter 940, plaintiffs still continue to be entitled to regain occupancy of any of the apartments from Lenox Hill by establishing that the apartment is intended for use as a primary residence of an owner or the owner's immediate family (*see,* 9 NYCRR § 2524.4 [a]), or that the owners intend to withdraw the apartment from the rental market (*id.,* at § 2524.5 [a] [1]). Additionally, plaintiffs can terminate any of the Lenox Hill leases and recover possession by showing that Lenox Hill or its subtenants com-

mitted any of the statutorily described wrongful acts authorizing an owner to evict (*see, id.*, at § 2524.3).

The foregoing establishes the virtually identical impairment of reversionary property rights here to that considered by the Supreme Court in *Yee v City of Escondido*, ___ US ___, 112 S Ct 1522). In *Yee*, the combined State and local mobile home park rent control and tenant eviction control laws imposed municipal regulation of rent increases, limited the park owner's right to terminate a mobile homeowner's tenancy to instances of nonpayment of rent and tenant misconduct, or the park owner's intention to use the park site for an entirely different purpose (*see, id.*, at ___, 112 S Ct, at 1526-1527). Moreover, the regulations in *Yee* barred a park owner from disapproving a transfer of ownership of any mobile home in the park or requiring the removal of a mobile home upon its sale. Just as contended here, the taking challengers in *Yee* asserted that under the legislative scheme "the mobile homeowner is effectively a *perpetual tenant* of the park, and the increase in the mobile home's value thus represents the right to occupy a pad at below-market rent indefinitely" (*id.*, at ___, 112 S Ct, at 1528 [emphasis supplied]). Not only did the Supreme Court in *Yee* reject the claimants' contention that the "perpetual tenancy" constituted a per se physical taking, it also ruled that the challenge to the regulation there fell within the class of cases where determining whether a taking had occurred "entails complex factual assessments of the purposes and *economic effects* of government actions" (*id.*, at ___, 112 S Ct, at 1526 [emphasis supplied]).

Attaching such critical significance on the takings question to the claimed permanent suspension of plaintiffs' reversionary rights also is inconsistent with the Supreme Court's rejection of the "conceptual severance" approach to challenges in *Penn Central Transp. Co. v New York City* (438 US 104, *supra*) and *Keystone Bituminous Coal Assn. v DeBenedictis* (480 US 470, *supra*). As stated in *Andrus v Allard* (444 US 51): "[W]here an owner possesses a full 'bundle' of property rights, *the destruction of one 'strand' of the bundle is not*

a taking, because the aggregate must be viewed in its entirety" (*id.*, at 65-66 [emphasis supplied]).

Elevating the reversionary, non-economic dominion interest of plaintiffs here to the status of a fundamental constitutional right on the regulatory takings question is, in my view, particularly inappropriate and unrealistic in the case of New York City real estate entrepreneurs in the residential rentals market, in which individual tenants and individual apartments are both highly fungible. In the New York City housing industry, an owner's genuine reversionary interest is satisfied by the ability to remove a financially or behaviorally irresponsible tenant—rights plaintiffs will continue to enjoy notwithstanding the application of Chapter 940.

Scholars and commentators on the takings clause have repeatedly pointed out that dominion property interests, that is, the right to exclude others or recover possession, may be of significance to an individual homeowner or even perhaps the lessor of a modest multi-family dwelling, but not for the modern urban real estate entrepreneur's leasing of a large apartment building where the values at stake in the landlord's reversionary rights are almost completely economic. Thus, Professor Costonis contrasted the dominion interests identified in William Pitt's famous illustration of English private property rights, that the most impoverished subject's weather-beaten cottage remained impregnable to all the King's forces, with the actual dominion interest of landlords such as plaintiffs.

> But the values comprehended by the dominion interest of Pitts' 'poorest man' in his 'ruined tenement' would seem to be worlds apart from those involved in the dominion interest of a Manhattan landlord, whose apartments are rented for profit to the general public and, when rented, are the subject of their tenants' exclusive possession. (Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 NYU L Rev 465, 519 [1983]; *see also*, Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis L Rev 925, 1010-1012, *supra*; Radin, *The Liberal Conception of*

Property: Cross Currents in the Jurisprudence of Takings, 88 Colum L Rev 1667, 1693-1695, *supra*; Note, *The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests*, 100 Harv L Rev 1067, 1081-1084 [1987]).

The majority's principal reason for finding a per se taking here is its conclusion that Chapter 940 fails to substantially advance any legitimate State interest because the legislation was enacted purely to serve the private interests of Lenox Hill. The majority also applies a heightened level of judicial scrutiny to the issue of whether Chapter 940 advances a legitimate State interest, i.e., requiring a close causal nexus between the legislative means and ends. The majority states that Chapter 940 "was sought and designed essentially to subsidize the non-profit hospital's special fringe benefit to some of its special health care employees" (sl opn p 13) and that Chapter 940 cannot be characterized as general welfare legislation because it merely serves as a "preservation of this Manhattan Upper East Side housing enclave for this privileged entity's benefit" (sl opn p 10). The absence of a close causal nexus is explained as follows: "The *central, underlying purpose* of the RSL is to ameliorate the dislocations and risk of widespread lack of suitable dwellings. Chapter 940 does not contribute to that desirable altruistic aim" (sl opn p 12 [emphasis supplied]).

Even under the heightened judicial scrutiny standard applied by the majority, a court is not permitted to pick and choose among the express purposes of legislation in employing the test of whether the requisite connection exists between the particular regulation and the problems the Legislature sought to ameliorate. Nor does strict scrutiny require that a regulation serve *all* of the legitimate State interests the Legislature sought to advance by the statutory scheme.

Undeniably, at least one of the original primary purposes of the rent stabilization laws was "to prevent speculative, unwarranted and abnormal increases in rents" and "to forestall [landlord] profiteering, speculation and other disruptive prac-

tices" (Findings of Declaration and Emergency, Local Law 1969, No 16, Administrative Code of City of NY § 26-501). The tenant eviction protection provisions of the RSL and ETPA not only have the purpose of ameliorating harmful dislocations of tenants (as alluded to in the majority's opinion), but also serve as a necessary element of any effective rent regulation program. As recognized by Justice Holmes in *Block v Hirsh* (256 US 135), the first Supreme Court takings clause review of rent control and tenant eviction protection legislation: "The preference given to the tenant in possession *is an almost necessary incident* of the policy [to prevent excessive rents] and is traditional in English law. *If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail* (*id.*, at 157-158 [emphasis supplied]). The Supreme Court again appreciated the need for tenant eviction protection to have effective rent regulation in construing Federal price control legislation a generation later "The Emergency Price Control Act was intended in part to prevent excessive rents in the public interest, and the *very anti-eviction regulations* under which the Administrator granted the eviction certificate here *were specifically designed to prevent manipulative renting practices which would result in excessive rents*" (*Parker v Fleming*, 329 US 531, 536-537 [emphasis supplied]).

Presumably because corporate primary tenants renting apartments for residential occupancy of officers or staff (such as Lenox Hill has done here) were also subject to the legislatively defined evil of "speculative, unwarranted and abnormal increases in rents", the Legislature in enacting the RSL in 1969 did not exempt corporate tenancies from the rent regulation and tenant eviction protection benefits of that statute. Hospital and other corporate tenants remained eligible for those benefits until the enactment of the Omnibus Housing Act (OHA) of 1983 (L 1983, ch 403) (*see, Koenig v Jewish Child Care Assn. of New York*, 67 NY2d 955; *see also, 520 East 81st Street Assocs. v Lenox Hill Hosp.*, 38 NY2d 525). As Judge Ciparick has cogently pointed out in her dissent the loss of the protections of the RSL and ETPA by non-

profit hospitals was "an unintended consequence of the OHA" (dissent, sl opn p 2). The relevant purpose of the OHA in requiring that the tenant on the primary lease be the occupant of any rent stabilized apartment was to forestall victimization of subtenants by "speculative and profiteering practices" of the primary tenants (dissent, sl opn p 2, [quoting L 1983, ch 403 §1]).

As the Bill Jacket to Chapter 940 demonstrates, the Legislature could readily have considered that the evils addressed by the primary tenant residency requirements of the OHA were totally inapplicable to the non-profit community hospitals' subletting of nearby apartments to nursing staff "with a portion of the rent being subsidized by the Hospital" (Letter from Lenox Hill Hospital dated July 17, 1984, Bill Jacket, L 1984, ch 940, at 24). The Legislature also could readily have determined that non-profit hospitals continued to need the protections of the RSL and ETPA. The very same housing market conditions that impelled the original adoption of rent stabilization—apartment scarcity and artificially inflated rents—created a crisis for the hospitals by jeopardizing their ability to maintain adequate staffing. "The high cost of housing and the shortage of available apartments in Manhattan has created the need for the Hospital to provide adequate and moderately priced housing in order to recruit and retain registered nurses" (Letter from Lenox Hill Hospital dated July 27, 1984, Bill Jacket, L 1984, ch 940, at 27).

Moreover, contrary to the assumption of the majority, the crisis was not unique to Lenox Hill Hospital. Mailgrams from the president, director of nursing and general medical director of Beth Israel Medical Center urging the Governor's approval of Chapter 940 state:

> This legislation is essential to hospitals that rent apartments for use by affiliated health care personnel such as nurses. Failure to sign this legislation will make it impossble (sic) for us to provide safe and affordable housing for staff members. The inability to secure such housing seriously compromises our ability to service our community's health care needs (*id.*, at 35-37).

There is nothing in the record or legislative history to impugn the representation by Lenox Hill that enactment of the provisions of Chapter 940 was "actively sought" by the Association of Hospital Housing Administrators, a group representing 20 nonprofit hospitals in Metropolitan New York (Letter from Lenox Hill Hospital dated July 27, 1984, Bill Jacket, L 1984, ch 940, at 29, *supra*).

The Legislature therefore could have concluded that removing the protections of the RSL and the ETPA from New York City's non-profit hospitals placed the hospitals in the plight of being unable to maintain adequate nursing staff because of the loss of apartment renewals, or negotiating with the landlords (fully aware of the acuteness of the hospitals' housing needs) for renewals at artificially inflated market rental rates. When, thus, considered in its context within the statutory framework of the rent stabilization laws as a whole, and giving a fair and comprehensive reading to Chapter 940's own legislative history to ascertain the ends the Legislature chose to serve in enacting it, surely Chapter 940 substantially advances a legitimate State interest, even under the heightened level of judicial scrutiny applied by the majority requiring a close causal nexus between this land use regulation and "the problems sought to be ameliorated" (*Rent Stabilization Assn. of New York City v Higgins*, 83 NY2d 156, 174).

Essentially, Chapter 940 restored to non-profit community hospitals in New York City the protections of the rent stabilization laws they previously enjoyed, against excessive rent increases and landlord profiteering (caused by artificially inflated rental market conditions), protections apparently unintentionally withdrawn by enactment of the OHA. Reinclusion of New York City non-profit hospitals within the broad class of human tenants and their successor family members subject to rent stabilization directly and undeniably serves the legislative protective and preventive goal with respect to abnormal rental increases and landlord profiteering. Indeed, as I have already shown the legislative history of Chapter 940 easily supports a legislative determination that

non-profit hospitals have special needs to be included within the protective umbrella of the RSL and ETPA.

Moreover, it was entirely reasonable to exempt nonprofit hospital tenancies from the primary tenant residency requirements of the OHA, the purpose of which was to ameliorate an entirely different problem than that addressed by the RSL and ETPA, i.e., primary tenant manipulation and exploitation of the rent stabilization laws in entering into subleases.

Chapter 940 more than satisfies any possibly required heightened level of judicial scrutiny. Its provisions, including the periodic rental increases to which landlords of the hospitals are entitled, are narrowly tailored to minimize if not totally avoid any transfer of wealth from landlords to lessee hospitals (*see, Yee v City of Escondido*, ___ US ___, ___, 112 S Ct 1522, 1529, *supra*) as a result of the economic regulation embodied in Chapter 940. The absence of any evidence in the record of an adverse economic impact upon plaintiffs as a result of the application of Chapter 940 powerfully suggests that the Legislature succeeded in that effort. Certainly plaintiffs have not tendered any less restrictive legislative alternative that would accomplish the protective purposes of Chapter 940.

Nor is it of any significance on the takings issue, as the majority implies, that non-profit community hospitals were singled out among other possibly worthy institutions for the continued benefits of the rent stabilization laws. Surely maintaining the non-profit hospitals' "ability to service [their] community's health care needs" (Beth Israel's Mailgrams, Bill Jacket, L 1984, ch 940, *supra*), without adding to health care costs the excessive landlord profits from abnormal rent increases, merits special legislative concern. In *Rent Stabilization Assn. of New York City v Higgins* (83 NY2d 156, *supra*), we deferred to the expertise of the State Division of Housing and Community Renewal as to "the designation of classes of individuals to whom [the agency] has extended noneviction protection" (*id.*, at 174). The Legislature is entitled to at least the same deference. That the majority may consider Chapter 940 to be "*underinclusive* is, of course, no

justification for rejecting it" (*Keystone Bituminous Coal Assn. v DiBenedictis*, 480 US 470, 487 n 16, *supra*). "[Congress] need not control all rents or none. It can select those areas or those classes of property where the need seems the greatest" (*Woods v Cloyd W. Miller, Co.*, 333 US 138, 145).

For all of the foregoing reasons, I conclude that plaintiffs have failed to satisfy their heavy burden of establishing the unconstitutionality of Chapter 940 as a regulatory taking in its application to them.

III.

I wish to add some additional comments on the appropriate level of judicial scrutiny in regulatory takings challenges. This Court in *Seawall Assocs. v City of New York* (*supra*) read the Supreme Court', decision in *Nollan v California Coastal Commn.* (*supra*) as imposing in regulatory takings cases a heightened level of judicial scrutiny, i.e., requiring a close causal nexus between the legislative means and ends, in applying the primary per se test of whether the challenged regulation substantially advances a legitimate State interest. We unanimously adhered to that interpretation of *Nollan* in rejecting the facial challenge to the regulation in *Rent Stabilization Assocs. v Higgins* (83 NY2d 156) and, as I have already outlined in the main body of this dissent, I am confident that Chapter 940 satisfies the constitutional standard at the "close causal nexus" level of scrutiny.

Subsequent to our decision in *Rent Stabilization Assn. v Higgins* (*supra*), in *Dolan v City of Tigard* (___ US ___, 114 S Ct 2309) the Supreme Court reaffirmed its holding in *Nollan* and further explained the quantum of the close causal nexus required in *Nollan*. In *Dolan*, involving a regulatory taking claim similar in nature to that considered in *Nollan*, the majority held that the required nexus the *municipality had the burden to demonstrate* was " 'rough proportionality' " (*supra*, ___ US, at ___, 114 S Ct, at 2319) between the regulatory exaction from the property owner and the problem it addressed.

Nollan and *Dolan* both involved the imposition by a governmental land use administrative agency at the State or local level of conditions for discretionary approval of building permit applications by landowners, thereby requiring the landowners to dedicate property rights of permanent physical occupation of their land to the general public. In both cases, the Supreme Court held that the exaction of those conditions would have constituted per se physical takings if instead they had been manifested as direct orders for the landowners to cede rights of physical occupation for some general welfare purpose (*see, Nollan, supra*, 483 US, at 831; *Dolan, supra*, ___ US, at ___, 114 S Ct, at 2316).

Prior to *Dolan*, some respected takings clause scholars interpreted *Nollan* as limiting its close causal nexus scrutiny to the regulatory imposition of conditions of permanent physical occupation which would otherwise constitute a per se taking (*see*, Michelman, *Takings 1987*, 88 Colum L Rev 1600, 1608-1609; Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis L Rev 925, 949-950, n 146, 149, *supra*; Tribe, *American Constitutional Law*, § 9-4, at 599 n 20 [2d ed]).

My reading of *Dolan* leads me now to agree. First, clearly and expressly, *Dolan* limits its imposition of the burden on the regulator to demonstrate rough proportionality in the " 'essential nexus' " (majority sl opn p 9) to cases involving administrative agency impositions of suspect conditions of physical occupation. Chief Justice Rehnquist's majority opinion in *Dolan* states:

> Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. (*see, e.g. Euclid v Ambler Realty Co.*, 272 US 365 [1926]). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation the

burden properly rests on the city (*Dolan, supra,* ___ US, at ___ n 8, 114 S Ct, at 2320 n 8).

Second, in *Dolan* Chief Justice Rehnquist contrasted the typical "land use regulation [which] does not effect taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' *Agins v Tiburon,* 447 US 255", with the regulatory action at issue in *Dolan,* where "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel [and] the conditions imposed were not simply a limitation on the use petitioner might make of her parcel, but a requirement that she deed portions of the property to the city" (*supra,* ___ US, at ___, 114 S Ct, at 2316).

Finally in *Dolan,* the majority decision justified the application of heightened scrutiny by referring to *Nollan's* adaptation of the "well-settled doctrine of 'unconstitutional conditions,' [under which] the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit" (*id.,* at ___, 114 S Ct, at 2317). The *Dolan* majority also invoked the conclusion in *Nollan* that without a close connection between the relevant governmental purpose and the required conditional dedication of property, the exaction of a land occupation dedication as a condition for a discretionary permit approval comes down to nothing more than "gimmickry" to obtain an appropriation of property by " 'extortion' " without paying for it (*id.,* at ___, 114 S Ct, at 2317).

Since neither the doctrine of unconstitutional conditions nor the metaphor of municipal extortion masquerading as conditional land development permit approval has ever been invoked to determine the validity of rules merely regulating the *use* of property, I conclude that the *Nollan* and *Dolan* heightened close causal nexus judicial scrutiny is really a judicial response to the special dangers in development permit cases of abuse of the regulatory process to achieve a physical taking of an applicant's property without just compensation.

Thus, in my view, heightened, close causal nexus scrutiny should not be applied to test the validity of all regulatory taking challenges, and should not have been applied in the instant case, although I am convinced that Chapter 940 of the Laws of 1984 can withstand that level of scrutiny. Until either the Supreme Court speaks definitively on whether its rule in *Nollan* and *Dolan* applies generally to all regulatory takings challenges, or this Court chooses to reappraise its reading of *Nollan* as so applying generally to all regulatory taking challenges, I am constrained by stare decisis to apply that level of scrutiny here, and have done so, concluding nonetheless that Chapter 940 thus scrutinized is valid.

CIPARICK, J. (dissenting):

Since 1969, the New York City Council has embraced rent stabilization, "second generation rent control[1]," to ameliorate the "serious public emergency" caused by an acute rental housing shortage within New York City (Admin Code § 26-501). The Rent Stabilization Law (RSL) (Admin Code § 26-501 et. seq.) has consistently been repromulgated, most recently as of March 30, 1994, based on the legislative finding that this "serious public emergency" persists (Admin Code § 26-502 [Loc L 1994, No 4 § 6]). Yet, rent stabilization is not intended to be a permanent, pervasive fixture in the rental housing market. To this end, amendments to the RSL have been adopted to address perceived changes in the urban rental housing market and to remedy abuses.

The enactment of the Emergency Tenant Protection Act (EPTA) in 1974 (L 1974, ch 576) and the Omnibus Housing Act Of 1983 (OHA) [L 1983, ch 403] were directed at

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[1] The Rent Stabilization Law was adopted in 1969 as a "compromise solution" to runaway rent increases affecting some 400,000 post-1947 units previously unregulated and to allay builders' fears that rent control would be extended to new construction (*see*, *8200 Realty Corp. v Lindsay*, 27 NY2d 124, 136-137; *Sullivan v Brevard Assocs*, 66 NY2d 489-494).

restricting the tenant's right to sublet the stabilized unit. The OHA amended the RSL (Admin Code §§ 26-504[a][1][f] and 26-511[c] [12]) to, *inter alia*, exempt units not occupied by the tenant of record as a primary residence from the protections of the RSL. The OHA was adopted in response to "speculative and profiteering practices" by tenants who capitalized on their rent stabilized leases by subletting for a profit or warehousing units in the hope of conversion to individual ownership. In accord with the salutary purposes of the RSL, itself an emergency response to the public housing crisis engendered by disruptive rental practices, including landlords' manipulation of rents and the supply of modestly priced housing, the OHA is designed to protect "public health, safety and welfare" by regulating the conditions of rental occupancy to "prevent uncertainty, potential hardship and dislocation of tenants" (L 1983, ch 403 § 1).

Chapter 940 of the Laws of 1984 was enacted to remedy an unintended consequence of the OHA. Because landlords no longer had to offer renewal leases to tenants who did not use their stabilized units as their primary residence, the authorized subtenants of not-for-profit hospitals were not entitled to renewal leases, subjecting them to eviction. By amending the RSL to create an exception to the primary residence requirement for not-for-profit hospitals that sublease units to their employees, the Legislature recognized that subtenancies created by not-for-profit hospitals were not susceptible to the vices the OHA intended to regulate and that the tenancies of not-for-profit hospitals are consistent with the purposes of the RSL and the ETPA. Indeed, the Division of Housing and Community Renewal (DHCR), the state agency charged with administering the RSL, recommended that the Governor approve Chapter 940 (*see*, Letter of Division of Housing and Community Renewal Commissioner Yvonne Scruggs-Leftwich, Bill Jacket L 1984, ch 940, at 14-15).

The majority declares Chapter 940 unconstitutional, finding no causal nexus between Chapter 940 and the RSL. I respectfully dissent and would declare Chapter 940 constitutional. The close causal nexus between Chapter 940 and the

RSL is that Chapter 940 implements a means of addressing the serious public emergency of housing people in New York City by continuing the protections of the RSL for particular tenancies already subject to rent stabilization. In this regard, Chapter 940 does not suffer from any constitutional infirmity.

I.

Defendant-respondent Lenox Hill Hospital (Lenox Hill) has maintained rental apartments at 420 East 79th Street, New York City, approximately two blocks from its facility, to house affiliated employees since 1964. Lenox Hill instituted a housing program in the 1960's in order to provide convenient, safe and affordable housing for affiliated employees, such as nurses, who work shifts that can begin or end at midnight. Typically, Lenox Hill would execute leases for a number of apartments as the tenant and then sublease an apartment to its employee, who would then assume subtenancy as an incidence of employment. Lenox Hill required the employee to occupy the apartment as a primary residence. Prior to passage of Chapter 940 in 1984, Lenox Hill leased approximately 210 units in close proximity to its facility for occupancy by staff members.

In 1976, plaintiffs purchased 420 East 79th Street, at which time Lenox Hill rented 18 of the 112 units. Lenox Hill is presently the tenant of record for 15 apartments, all of which are subject to the RSL. Until 1991, plaintiffs regularly extended two year renewal leases to Lenox Hill. Prior to the December 31, 1991 expiration of six of the leases, plaintiffs served Lenox Hill and the subtenants of those units with notices of nonrenewal, informing them that the leases would not be renewed because Chapter 940 of the Laws of 1984 is unconstitutional and unenforceable as it purports to grant the subtenants the right to renewal leases and/or continued occupancy, and that Lenox Hill does not occupy the subject apartments as a primary residence as required by the RSL (9 NYCRR §§ 2524.2 and 2524.4[c]). This action ensued.

The legislative history of Chapter 940 demonstrates that it was designed to reinstate the pre-OHA statutory criteria and enable not-for-profit hospitals, such as Lenox Hill, to continue established housing programs. To this end, the senate sponsor cited Lenox Hill strictly as "an example" of a not-for-profit hospital within the measure's purview (*see*, Senate Debates, S. Bill No. 9983, June 28, 1984).

Against this background, two factors are noteworthy. First, any buildings owned or operated on a not-for-profit basis by a hospital or other eleemosynary institution are exempt from regulation under the RSL (Admin Code § 26-511[c]) and the ETPA (McKinney's Unconsolidated Laws of NY § 8625[a][6]). Second, the Legislature recently narrowed the range of leases subject to rent stabilization by decontrolling units that rent at $2,000 per month and whose occupants' federal adjusted gross income exceeds $250,000 for two consecutive calendar years. While these factors may mark steps in the "transition from regulation to a normal market of free bargaining between landlord and tenant" (Admin Code § 26-401[a]), this course, if it continues, must be paved by the Legislature.

While rent stabilization conceptually represents an attempt to equalize the tenant's bargaining power in a scarce housing market by regulating the rental terms,[2] the practical result of rent stabilization is to redistribute the landlord's interest (*see*, Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brooklyn L Rev 741[1988]; Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control*? 21 Sw U L Rev 1019[1992]). Politically, this market redistribution is accepted in the form of rent stabilization as a legitimate exercise of the State's police power in response to rental housing

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[2] It has been suggested that the function of rent stabilization is to eliminate sharp, short-term rent fluctuations while the housing market responds to a shortage over time, not to hold rents at below market levels indefinitely, and calibrated, periodic increases provide owners incentive to increase the housing supply while avoiding dramatic swings in rents (*see*, Cirace, *Housing Market Instability and Rent Stabilization*, 54 Brooklyn L Rev 1275, 1278-1279).

crises, historically a vestige of World War II and, most recently, the consequence of market imbalances that create mass dislocations and shortages of affordable housing (*see*, Manheim, *Tenant Eviction Protection and the Taking clause*, 1989 Wis L Rev 925; *see also Braschi v Stahl Assocs. Co*, 74 NY2d 201, 208, *Block v Hirsch*, 256 US 135, 156).

Whether the rubric of rent stabilization is the appropriate means to address this end is a policy issue not appropriate for judicial resolution (*see*, *Eisen v Eastman*, 421 F2d 560, 567 *cert denied* 400 US 841; *Lincoln Buildup Assocs v Barr*, 1 NY2d 413, 415 *app dismissed* 355 US 12). It is not for this Court to question the reasonableness, propriety, wisdom or expediency of the legislative declaration that a housing emergency continues in New York City or to dismantle rent regulation on a piecemeal basis by judicial fiat where, as here, the statutory amendment is not only in harmony with the intent of the RSL and ETPA but substantially advances the State's interest in militating the relentless rental crisis in New York City (*see*, *Federal Home Loan Mortgage Corp. v New York State Div. of Housing and Community Renewal*, 854 F Supp 151; *Rent Stabilization Assn. of New York City Inc. v Higgins*, 83 NY2d 156, 174, *cert denied* ___ US ___, 114 S Ct 2693).

II.

The Supreme Court has "consistently affirmed that states have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails" (*Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419, 440; *see also*, *Pennell v San Jose*, 485 US 1, 12 n 6; *Bowles v Willingham*, 321 US 503, 517-518; *Loab Estates, Inc. v Druhe*, 300 NY 176, 179). Similarly, the Supreme Court has upheld the authority of state and local governments to engage in land use planning against constitutional challenge, recognizing that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change

in the general law" (*Dolan v City of Tigard*, ___ US ___, 114 S Ct 2309, 2316, quoting *Pennsylvania Coal Co. v Mahon*, 260 US 393, 413). Nevertheless, a governmental regulation cannot trespass the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation. This guarantee was designed to bar government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v United States*, 364 US 40, 99 [applicable to states via Fourteenth Amendment]; *see, Chicago Burlington & Quincy R.R., Co. v Chicago*, 166 US 226).

A claim that a governmental act infringed upon an owner's Fifth Amendment rights is traditionally evaluated on an *ad hoc* factual basis (Penn Cent. Transp. Co. v New York City, 438 US 104, 124 *reh denied* 439 US 883). The economic impact of a governmental act upon an owner and the extent of interference with an owner's investment-backed expectations are relevant considerations in this evaluation which, as majority states, partakes of no precise formulation (Majority Opn. at 7, citing *Dolan v City of Tigard* 114 S Ct at 3319). It is the opinion of this dissenter, as distinct from the analysis proffered by my dissenting colleague, that the application of these factors should not be parlayed into a discrete takings analysis.

As takings jurisprudence has evolved, the Supreme Court has identified certain intrusions as compensable "without case specific inquiry into the public interest advanced in support of the restraint" (*Lucas v South Carolina Coastal Council*, ___ US ___, 112 S Ct 2886, 2893). Regulations that compel a landowner to endure a physical invasion (*Yee v City of Escondido*, 503 US ___, 112 S Ct 1522, 1528), and regulations that deprive a landowner of all productive or economically beneficial use of the land (*Nollan v California Coastal Commn.*, 483 US 825, 834) constitute these types of compensable takings. However, a governmental regulation will not be found to effect a taking if it "substantially advance[s] legitimate state interests" or does not "den[y] an owner eco-

nomically viable use of his land" (*Agins v Tiburon,* 447 US 255, 260; *Dolan v City of Tigard,* 114 S Ct, at 2316-2317, *supra*; *Seawall v City of New York,* 74 NY2d 92, 107 *cert denied* 493 US 976; *Rent Stabilization Assn.,* 83 NY2d, at 171 and 173, *supra*). A regulation that substantially advances a state interest is constitutionally sound when there is an "essential nexus" between the state interest and the end result of the regulation (*Seawall, supra,* 74 NY2d, at 107). In its recent plurality opinion in *Dolan v City of Tigard,* 114 S Ct 2309, *supra,* the Supreme Court deliberated over the level of scrutiny that governmental motivations and findings should be subjected to when assessing whether such objectives are constitutionally sufficient to justify the regulation. The five justice majority settled on a heightened level of judicial scrutiny, identifying the measure of the nexus requirement as one of "rough proportionality" (*Dolan v City of Tigard, supra,* 114 S Ct, at 2319-2320).

In concluding that Chapter 940 does not advance the overall purposes of the RSL, but rather masquerades as general welfare legislation that preserves an exclusive housing enclave for Lenox Hill, the majority impinges upon the State's prerogative to proportionally extend the scope of the RSL consistent with its declaration of emergency, and its underlying goals which are legitimate state interests deserving protection.

III.

Chapter 940 does not affect a regulatory taking and is constitutionally sound because it substantially advances the State's interest in curbing chronic rental housing shortages.

In countenancing plaintiffs' argument that they are unduly burdened by Chapter 940, and characterizing Chapter 940 as an unconstitutional taking, the majority overlooks the fact that the entire scheme of rent stabilization saddles owners of rental buildings with greater burdens than their unregulated counterparts in furtherance of the public health, safety and welfare, and excuses plaintiffs from a contractual obligation

at the expense of tenants identified as deserving of statutory protection.

By its express terms, the RSL was promulgated "to prevent speculative, unwarranted and abnormal increases of rents . . . which creates a special hardship to persons . . . occupying rental housing" (Admin Code § 26-501). The essential goal of the RSL is to protect and preserve certain designated tenancies from the vagaries of the marketplace. As Chapter 940 is not limited to Lenox Hill but extends to all not-for-profit hospitals, it is anomalous to single out Chapter 940 as "special interest legislation" since by its very nature rent stabilization bestows preferences on designated tenancies (*see, Hotel Dorset Co. v Trust for Cultural Resources of the City of New York,* 46 NY2d 358, 367 & 368 n 3; *see also,* Letter of Hospital Assn of New York State to Governor's Counsel, Bill Jacket L. 1984, ch 940, at 21 [recommending enactment of ch. 940]; Mailgrams from Beth Israel Hospital to Governor, Bill Jacket L. 1984, ch 940, at 35-37 [requesting enactment of ch 940 as essential to hospitals]; *cf, 19th Street Assocs. v State of New York,* 79 NY2d 434).

It is a recognized policy of DHCR to require landlord-owners to offer renewal leases to corporate tenants that lease stabilized apartments for their affiliated officers, directors or employees provided the actual occupant satisfies the primary residence requirement (*see, Matter of Cale Dev. Co., Inc. v Conciliation and Appeals Bd.,* 94 AD2d 229, 232 *aff'd* 61 NY2d 926; *Matter of Sommer v Conciliation and Appeals Bd.,* 115 Misc 2d 820 *aff'd* 93 AD2d 481 *aff'd* 61 NY2d 973; *Matter of Sommer v Conciliation and Appeals Bd.,* 116 AD2d at 459, *supra*; *see also, Koenig v Jewish Child Care Assn.,* 67 NY2d 955, 957). Consistent with this policy, DHCR supported enactment of Chapter 940 as it constituted codification of existent administrative policy (*see,* Letter of DHCR Commissioner Scruggs-Leftwich, Bill Jacket, L 1984, ch 940, *supra*), and ensured that currently protected tenancies would so remain.

Plaintiffs suffered no diminution of rights as a consequence. Chapter 940 in no way impairs the owners' rights to

collect periodic rent increases (*see*, 9 NYCRR § 2522.5); evict unsatisfactory subtenants (*see*, 9 NYCRR § 2524.2); or, completely alter the use of the premise (*see*, 9 NYCRR § 2524.3; compare *Seawall*, 74 NY2d at 108, *supra*).

It is precisely because the units now rented by Lenox Hill have been and will continue to be subject to the RSL that Chapter 940 is causally related to the goals of the statute it amended. As Supreme Court found and the Appellate Division upheld "[t]here is no question but that the apartments are in fact rented to hospital employees [and] it is ultimately residential tenants who are being protected" (*Manocherian, et. al. v Lenox Hill Hospital*, 154 Misc 2d 982, 991 *aff'd* 196 AD2d 726. It was plaintiffs who accepted Lenox Hill as the tenant and consequently cloaked Lenox Hill with protection against the acute rental housing shortage through their participation in recent stabilization. Chapter 940 ensures Lenox Hill will continue to receive those benefits of the RSL it currently extends to its employee-subtenants, who then escape the perils of the rental market as an incidence of employment (*see, Sommer v New York Conciliation and Appeals Bd.*, 116 AD2d 457, 459).

The majority's assault on Chapter 940's scope is further minimized in light of the blanket exception from the provisions of the RSL and ETPA for housing accommodations owned or operated by non-profit eleemosynary institutions (Admin Code § 26-511[c]; McKinney's Unconsolidated Laws of NY § 8625[a][6]; *cf.* § 8625[a][11]). That the ability of these institutions to provide adequate, affordable housing to their affiliates remains unimpaired despite the broad sweep of the RSL and ETPA is indicative of the State's interest in protecting and preserving dwellings used to house affiliates of such institutions. The Lenox Hill employees, as subtenants, are entitled to the protections of the RSL and thus should not be penalized as a result of Lenox Hill's inability or unwillingness to serve as a prime landlord or owner engaged in real estate development. A legitimate goal of rate regulation, such as rent stabilization, is the protection of the "consumer's"

welfare (*see, Pennell v City of San Jose,* 485 US at 12, *supra*).

Therefore, it cannot be said, as a matter of law, that the goals of the RSL "to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare" are not promoted when the effect of Chapter 940 is to permit an urban not-for-profit hospital to offer its health care workers convenient, safe and affordable housing that otherwise would not be available (*see, 19th St. Assoc v State of New York,* 79 NY2d 434, 443). It is the declaration of unconstitutionality by the majority that will yield a result contrary to the RSL.

In wresting the subject rent stabilized apartments from Lenox Hill, the majority will cause the eviction of tenants from already protected dwelling space, who did nothing other than occupy their units as primary residences. By characterizing Chapter 940 as a statute that diverts and subverts the equal treatment regime, the majority not only ignores the realities of rent stabilization in the urban center, but tips the balance in favor of the party that already has unequal bargaining power. This is exactly the oppressive behavior the RSL, as amended by Chapter 940, seeks to forestall.

That the subtenant's occupancy is contingent on employment by Lenox Hill does not contravene the intent of the RSL, contrary to the majority's contention, as Lenox Hill's motive for maintaining the rent stabilized units is to house its affiliated employees, not the general population. Obviously, an employee on the verge of retirement or otherwise poised to sever the employment relationship has notice of the requirement that occupancy is contingent upon employment by Lenox Hill as to allow for appropriate relocation plans. In any circumstance, the subtenant would receive a standard termination notice and be afforded all substantive and procedural due process rights as required by law, including a summary proceeding in Civil Court (*see,* 9 NYCRR §§ 2524.2 and 2524.3).

IV.

As this Court has recognized, rent regulation creates tenancies of indefinite duration (*see, Rent Stabilization Assn,* 83 NY2d, at 172-173, *supra*). It is, therefore, of no consequence whether the tenant is an individual with a finite life span or a corporation endowed with a perpetual existence, because the same result obtains (*see, Seawall,* 74 NY2d, at 112, *supra*; *Nollan,* 483 US, at 837, *supra*). Plaintiffs, who bear the heavy burden of demonstrating that the subject enactment is unconstitutional, fail to establish by any empirical proof that the rental rates of the Lenox Hill units are any less than those of comparable units in the building as to deprive them of the economically beneficial use of their property. Indeed, plaintiffs have and will continue to voluntarily collect rents from the Lenox Hill subtenants, as well as increases "by a sum equal to 15 percent of the previous lease rental" whenever Lenox Hill executes a renewal lease, provided plaintiffs have not received any vacancy increases or surcharges in the seven years prior to the new renewal lease.

Any objection plaintiffs harbor regarding the sufficiency of the 15 percent vacancy figure is more appropriately addressed in a hardship petition before DHCR. There is no merit to Lenox Hill's claim that plaintiffs are estopped from any such challenge to Chapter 940.

I would reject plaintiffs' assertion, credited by the majority, that plaintiffs have forfeited their reversionary interests in the subject units. This contention rings hollow when confronted with the fact that the use plaintiffs intended for the property has remained constant and plaintiffs have enjoyed the security of a tenant that always pays the rent (*see, Bowles v Willingham,* 321 US, at 517-518, *supra*; *Penn Central Transp. Co. v New York City,* 438 US, at 136, *supra*; *Rector, Wardens and Members of the Vestry of St. Bartholomew's Church v City of New York,* 914 F 2d 348, 356). "It is the forced occupation . . . not the identities of the new tenants or terms of the leases, which deprives the owners of their possessory interests and results in . . . takings" (*Seawall,* 74

NY2d, at 106, *supra*; *see also, Heart of Atlanta Motel, Inc. v United States*, 379 US 242, 261). In this regard, plaintiffs' "investment backed expectations" have been and will continue to be realized as there is no evidence that plaintiffs intend to sell or otherwise change the use of the subject apartments.

Plaintiffs have failed to demonstration that Chapter 940 effects a regulatory taking. Because Chapter 940 substantially advances legitimate state interests and does not deprive plaintiffs of any economically beneficial use of their property, I conclude Chapter 940 withstands constitutional scrutiny.

Accordingly, I would affirm the order of the Appellate Division.

* * * * * * * * * * *

Order reversed, with costs, Chapter 940 of the Laws of 1984 declared unconstitutional and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein. Opinion by Judge Bellacosa. Judges Simons, Titone, Mangano and Crew concur. Judges Levine and Ciparick dissent and vote to affirm in separate dissenting opinions. Chief Judge Kaye and Judge Smith took no part.

Decided October 20, 1994

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding

1 No. 135

AMIR MANOCHERIAN, et al.,

Appellants,

—v.—

LENOX HILL HOSPITAL, &c., et al.,

Respondents,
et al.,
Defendants.

The appellants in the above entitled appeal appeared by Rosenberg & Estis, P.C.;
the respondents appeared by Edmond F. Wolk, Esq. and Proskauer Rose Goetz & Mendelsohn; Hon. G. Oliver Koppell, Attorney General of the State of New York appeared; and *amici curiae* appeared by Klein & Keenan, Esqs. and Ronald A. Zumbrun, Esq.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, Chapter 940 of the Laws of 1984 declared unconstitutional and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein. Opinion by Judge Bellacosa. Judges Simons, Titone, Mangano and Crew concur. Judges Levine and Ciparick dissent and vote to affirm in separate dissenting opinions. Chief Judge Kaye and Judge Smith took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

_____

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 20, 1994

Sullivan, J.P., Ellerin, Kupferman, Ross, Asch, JJ.

49406 AMIR MANOCHERIAN, et al.,

Plaintiffs-Appellants,

—against—

LENOX HILL HOSPITAL, etc., et al.,

Defendants-Respondents,

—and—

T. O'CONNOR, et al.,

Defendants.

Order and judgment (one paper), Supreme Court, New York County (Myriam Altman, J.), entered January 8, 1993, affirmed for the reasons stated by Altman, J., without costs and disbursements. All concur except Sullivan, J.P. and Ross, J. who dissent in a memorandum by Sullivan, J.P., as follows:

SULLIVAN, J.P. (dissenting)

In this declaratory judgment action to determine, *inter alia*, whether Lenox Hill Hospital is entitled to renewal leases to six rent stabilized apartments at 420 E. 79th Street in New York City, the IAS court and, in affirming, the majority, interpret chapter 940 of the Laws of 1984 so that renewal leases to the six apartments in question, as well as 48 others similarly affected, must be offered to Lenox Hill effectively in perpetuity.

At issue is the proper interpretation of chapter 940, an amendment to the Rent Stabilization Law and the Emergency Tenant Protection Act applicable only to a not-for-profit hospital, such as Lenox Hill, which leases, and, in turn, subleases, rent stabilized apartments for the use of "affiliated" subtenants. Chapter 940 provides that stabilization coverage

will continue as long as the subtenant of the apartment is a primary resident. In all other instances of rent stabilization, it is the prime tenant who must reside in the apartment to maintain stabilization protection. Thus, since chapter 940 provides an exception for non-profit hospitals in determining primary residence, Lenox Hill, a corporation which could never be a primary resident of a rent stabilized apartment, is ensured of a continued supply of rent stabilized apartments.

Plaintiffs (the owner) acquired the building in question on April 1, 1976, subject to a lease between Lenox Hill and their owner predecessor entered into during the 1960's, prior to the enactment of the Rent Stabilization Law, effective as to these apartments on May 6, 1969, with respect to 18 apartments. The owner asserts that any interpretation of chapter 940 that permits Lenox Hill, an entity with an interminable corporate existence, to lease these apartments in perpetuity results in a regulatory taking since it is permanently deprived of its reversionary interest in the property, i.e., the expectancy that it will one day recover possession of the apartments to dispose of as it sees fit, and since no legitimate state interest is served by allowing the hospital to circumvent the Rent Stabilization Law by using the apartments in question as transient dormitory space for an ever changing succession of nurses.

A brief history of chapter 940 is in order to put the facts and procedural background of this case in proper perspective. Laws of 1971, chapter 373, amended the State Enabling Act for rent control and rent stabilization (L 1962, ch 21, also known as the Local Emergency Housing Rent Control Act) to exempt from regulation all housing accommodations "not occupied by the tenant in possession as his primary residence." The same langugage was used in section 5(a)(11) of the Emergency Tenant Protection Act of 1974 (L.1974; ch. 576, §4 [ETPA]), which exempted newly stabilized units. The phrase "tenant in possession" was considered as encompassing a subtenant. Thus, the non-primary residence exemption was inapplicable if a subtenant in possession used the apartment as his primary residence.

Laws of 1983, chapter 403, § 41 (also known as the Omnibus Housing Act [OHA]) amended Administrative Code § YY51-3.0 (renumbered § 26-504[a][1][f]) to exempt from the Rent Stabilization Law dwelling units "not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction." Thus, for purposes of the non-primary residence exemption, the named tenant himself had to occupy the apartment as a primary residence. No longer could he qualify for the benefits of rent stabilization, including the offer of a renewal lease, merely because a subtenant used the apartment as his primary residence.

OHA's restrictions on primary residence and subletting had an obvious adverse effect on Lenox Hill, which, for several years, had been subleasing rent stabilized apartments as dormitory space for its nurses. Lobbying the Legislature for relief so that safe, convenient and affordable housing would be available for its staff who are required to work evening shifts, Lenox Hill played a key role in introducing chapter 940 (*see, 520 E. 81st St. Assocs. v. Lenox Hill Hosp.*, 142 Misc 2d 723, 725, *revd* 157 AD2d 138, *revd on other grounds* 77 NY2d 944 [*Lenox Hill I*]).

Section I of chapter 940 amended the non-primary residence section of the Rent Stabilization Law, section YY51-3.0(f) of the Administrative Code (renumbered § 26-504[a][1][f]), to add, "[W]here a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants." Section 3 of chapter 940 amended section 5(a)(11) of the ETPA to add the same language. Thus, by virtue of chapter 940, subtenants of not-for-profit hospitals, which, pursuant to the OHA, could not be considered as "tenants" for the purposes of the non-primary residence exemption, were deemed tenants for determining primary residence.

Sections 2 and 4 of chapter 940 further amended the Rent Stabilization Law and the ETPA to give a not-for-profit hospital the right to sublet its apartments to affiliated employees

without first obtaining the owner's consent. In addition, unlike other tenants, who have the right to sublet for only two out of every four years, the duration of the not-for-profit hospital's subletting was completely unrestricted.

Of the six leases at issue, five were rented to Lenox Hill pursuant to leases dated July 5, 1973 and most recently renewed for two-year periods expiring August 30, 1991. These leases say nothing about Lenox Hill's right to sublet to affiliated employees; they provide that the apartment "shall be occupied only by Tenant [Lenox Hill] and the members of the immediate family of Tenant." According to the leases, subletting is permitted only with the prior written consent of the landlord. The most recent rent stabilized renewal lease for the sixth apartment expired on December 31, 1991. Pursuant to its housing program, Lenox Hill used all of the apartments for members of its nursing staff.

After service of the appropriate "window period" notice, the owner commenced two actions, now consolidated pursuant to stipulation, against Lenox Hill, the State of New York and the affected subtenants, one with respect to five of the leases at issue and the other with respect to the sixth, for a declaration, *inter alia*, that Lenox Hill was not entitled to a renewal lease. After joinder of issue by Lenox Hill, the State, by stipulation, remaining a nominal defendant solely to defend the constitutionality of chapter 940 and the subtenants neither appearing or answering, the owner moved for summary judgment. Lenox Hill and the State thereafter cross-moved for summary judgment.

The IAS court granted summary judgment to Lenox Hill and the State, finding that chapter 940 was not constitutionally infirm to the extent that it required the owner to offer leases in perpetuity to Lenox Hill. Insofar as is relevant to this appeal the IAS court rejected the owner's regulatory taking claim, finding that chapter 940 satisfied the first of the Supreme Court's two-prong test for determining whether a regulatory taking has occurred in that, in curbing oppressive conduct and profiteering by landlords, thus providing protection to Lenox Hill and its employees and promoting the

"health and welfare" of the general public by permitting non-profit hospitals to obtain for their medical personnel housing which might not otherwise be available, it substantially advanced a legitimate state interest. The court rejected the argument that Lenox Hill had a perpetual corporate existence and that an interpretation of chapter 940 which compelled the offer of a renewal lease to Lenox Hill extinguished the owner's reversionary interest in its property, finding that the Rent Stabilization Law "allows continuing occupancy by primary resident tenants and their family members under circumstances which might very well be perpetual." Thus, the court found that the owner had failed to show that it had been deprived of its reversionary interest in the apartments any more so than if it had rented to individual tenants. Since, in my view, the IAS court's premises in its regulatory taking analysis do not withstand scrutiny and chapter 940 fails both aspects of the two-pronged test for determining whether the constitutional guarantee against an uncompensated taking has been violated, I would reverse.

In *Seawall Assocs. v. City of New York* (74 NY2d 92, 107, *cert denied*, 493 US 976), the Court of Appeals summarized the two-pronged test for determining whether a regulatory taking has occurred. "[T]he constitutional guarantee against uncompensated takings is violated when the adjustment of rights for the public good becomes so disproportionate that it can be said that the governmental action is 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' (*Armstrong v. United States* [*supra*, 364 US at 49]). * * * It is basic * * * that * * * a burden-shifting regulation of the use of private property will, without more, constitute a taking: (1) if it denies an owner economically viable use of his property, *or* (2) if it does not substantially advance legitimate State interests (citations omitted). Either would be sufficient to invalidate a property-use regulation. (Emphasis in original.) (*See also, Nollan v. California Coastal Commn*, 483 US 825, 834; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 US 470, 485, 495; *Agins v. Tiburon*, 447 US 255, 260.)

With respect to the "legitimate state interest" aspect of the two-pronged test, it is important to note that chapter 940 applies only to apartments sublet to the affiliated employees of a not-for-profit hospital. Thus, should the subtenant, whether through retirement or a change of job, cease his or her employment with Lenox Hill, the lease tenant, he or she must voluntarily vacate or be evicted. In *Lenox Hill I* (157 AD2d 138, *supra*), which involved the same issue, this court noted with respect to the subtenants of the 39 apartments at issue that their employment at Lenox Hill was rather transitory, and that during the term of the last renewal leases there was a turnover in one-third of the apartments *(id.*, at 144). If, as the IAS court has held, chapter 940 requires the owner to offer renewal leases to Lenox Hill, whose employees, when they lose or leave their jobs, also lose their right to occupy the apartments, irrespective of how long they have lived there, then the very purpose of the Rent Stabilization Law, which was enacted to alleviate a severe housing shortage (*see*, Administrative Code § 26-501; McKinney's Uncons Laws of NY § 8622 [ETPA § 2]), is being contravened. A statutory interpretation which encourages the deployment of rent stabilized apartments in perpetuity as temporary dormitory space for an ever changing roster of hospital employees and promotes the displacement of these employees, some of whom may be long-term tenants, when they leave their employment does a disservice to rent stabilization's underlying purpose of protecting residential tenants from evictions during an acute housing shortage. (*See, Sterling v. Lapidus*, 10 AD2d 180, 185; *Suppus v. Bradley*, 278 App Div 337, 338-339.) Rather than serve the concept of tenant protection, such an interpretation would encourage the eviction of tenants in occupancy in favor of a corporate tenant, whose occupancy is, at best, constructive. It was never the purpose of rent regulation to protect corporations, but rather individuals. (*Matter of Schwartz Landes Assocs. v. New York City Conciliation & Appeals Bd.*, 117 AD2d 74, 81.)

Lenox Hill attempts to justify the IAS court's interpretation by arguing that, given the severe nursing shortage, the short-

age of available apartments and the limited financial resources available to hospitals, chapter 940 promotes the public welfare by providing it with apartments which might not otherwise be available. Without characterizing it as such, Lenox Hill is advancing a health care emergency argument. It should be noted that the Legislature has never declared a health care emergency. Nor has Lenox Hill cited any legislative history to support its theory as to what ills the statute was intended to cure. Moreover, chapter 940 is a provision of the Rent Stabilization Law, which was enacted to ameliorate a housing emergency, not to promote health care. Emergency legislation should not be extended beyond the problem sought to be remedied. (*See, People ex rel. McGoldrick v. Regency Park*, 201 Misc 109, 111, *affd* 280 App Div 804, *affd* 305 NY 650.) "Nor should the policy of promoting better health care be furthered by interpreting the Rent Stabilization Law so as to exacerbate the very housing emergency which rent stabilization was enacted to address." (*520 E. 81st St. Assoc. v. Lenox Hill Hosp., supra,* 157 AD2d at 150.)

With respect to the claim that chapter 940 was intended to help it "retain and attract staff", Lenox Hill does not need below-market rent stabilized apartments to attract nurses; it needs apartments, which it can obtain by making a capital investment in housing. Thus, what is at stake here is not Lenox Hill's ability to attract nurses but, rather, the cost of doing so. In that regard, it stresses the fact that it is "entirely dependent on government health care reimbursement rates." Lenox Hill, however, fails to show how the enormous and complex problem of health care costs will be solved by saving one hospital the difference between rent stabilized rents and market rents for a handful of apartments. There is no showing in this record as to how many apartments, other than the 54 leased by Lenox Hill, are affected by chapter 940.

In *Nollan v. California Coastal Commn., supra,* (483 US 825), the Supreme Court emphasized the level of scrutiny that must be applied in weighing the "legitimate state interest" test. "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved,

not that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.' " (*Id.*, at 836, n3 [citation omitted], quoting Brennan, J.'s dissent, *id.*, at 843, quoting *Minnesota v. Clover Leaf Creamery Co*, 449 US 456, 466.) Recent Supreme Court cases have bolstered the view that a heightened scrutiny is applicable to a claim of legitimate state interest in takings claims. In *Lucas v. South Carolina Coastal Council*, ___ US___, 112 S Ct 2886), the court held that a legislative claim of advancing a legitimate state interest could not be taken at face value when analyzing whether a regulatory taking had occurred. "Since [a harm-preventing] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." (*Id.*, at 2898, n12.)

Finally, even if chapter 940 could be considered as substantially advancing a legitimate State interest by alleviating a health care crisis, there is no justification for placing the burden of such remedial legislation on this owner and others similarly situated, who would thereby be compelled to " 'dedicate their properties to a public purpose' and bear a public burden which should be borne by society at large." (*520 E. 81st St. Assocs. v. Lenox Hill Hosp, supra*, 157 AD2d at 149, quoting *Seawall Assocs. v. City of New York, supra*, 74 NY2d at 114, 115.) If the Legislature determines to provide inexpensive housing for hospital employees it may, of course, subsidize Lenox Hill or its nurses in a variety of ways. But if it shifts the burden of that subsidy to individuals rather than the public at large, it must do so within constitutional limits.

Although, under this analysis, there is no need to reach the second prong of the regulatory takings test, whether chapter 940 deprives the owner of the economically viable use of his property, any interpretation of chapter 940 that requires the owner to offer Lenox Hill renewal leases in perpetuity extinguishes the owner's reversionary interest in the property, i.e., its eventual recovery of the apartments to use as it sees fit. "Even in rent-regulated apartments, a landlord has a reason-

able expectation, at some point, of a vacancy, which will result in a reversion of possession to him." (*520 E. 81st St. Assocs. supra,* at 150.) As was said of chapter 940 in *Lenox Hill I*): "If only a single element of an owner's 'bundle of property rights' is extinguished, there has been a regulatory taking under [this] prong. (*See, Hodel v. Irving,* 481 US 704; *see also, Seawall Assocs. v. City of New York, supra,* 74 NY2d, at 110.)" (*Id.*)

An owner who rents to an individual has the expectation, even with liberal succession rules, that an apartment will eventually revert back to his control. In fact, of the six nurse-subtenants in possession of these apartments in December 1972, only one is in occupancy today. The other apartments have had multiple occupants. But, while individual tenants will die or move away, Lenox Hill, in existence over 75 years, since June 29, 1918, will not. Thus, there is no merit to the argument, accepted by the IAS court, that under rent stabilization an owner is no more likely to realize a reversionary interest in an apartment rented to an individual than in one of the apartments rented to Lenox Hill. In *Rent Stabilization Assn. v. Higgins* (164 AD2d 283, 298), this court, in another context, pointedly observed that while a landlord who rents to Lenox Hill is deprived of its reversionary interest in perpetuity, the use of the property in perpetuity by an individual tenant "is simply not a potential result."

Nor is there any merit to Lenox Hill's argument that the owner has not lost its reversionary interest because rent regulation is not permanent. Among the provisions of Local Law No. 9 invalidated in *Seawall Assocs. v. City of New York, supra* (74 NY2d 92), was a five-year moratorium on the conversion, alteration and demolition of single room occuapncy [sic] properties. As with the Rent Stabilization Law, the moratorium provided for subsequent renewals, "as the City Council deems necessary" (*id.*, at 100). Despite the "temporary" nature of the enactment, the Court of Appeals found a taking, both physical and regulatory. As a practical matter, as with Lenox Hill's existence, there seems to be no foreseeable end to rent regulation. Ironically, the cases cited by Lenox Hill in

support of the proposition that rent regulation is of temporary duration, i.e., *Loab Estates, Inc. v. Druhe* (300 NY 176), *Teeval Co. v. Stern* (301 NY 346) and *Lincoln Bldg. Assocs. v. Barr* (1 NY2d 413), were decided in 1949, 1950 and 1956, respectively.

In the normal lease arrangment, even under rent stabilization, an owner has the right to reenter his own property, to rehabilitate vacant apartments and increase rents in accordance with stabilzation guidelines, combine adjoining apartments and raise the rent to market rates, subject thereafter to stabilization guidelines, and to utilize vacant apartments for the personal use of family members. Here, the owner's future right to reassert its domain over the property with respect to any of these rights is lost.

Lenox Hill argues that an owner's reversionary interest in a rent stabilized apartment is too limited to constitute a sufficient component of an owner's property rights as to be independently the subject of an economic viability deprivation. A taking, it argues, must be measured by the impact of the restriction upon the property as a whole. The right to exclude others, however, has always been considered " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " (*Hodel v. Irving*, 481 US 704, 716, quoting *Kaiser Aetna v. United States*, 444 US 164, 176.) *Hodel* involved the abrogation of an owner's "right to pass on property" to his heirs. In language equally pertinent here, the court held, "Of course, the whole of appellees' decedents' property interests were not taken by [the statute]. Appellees' decedents retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*. There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right." (*Id.*, at 715.)

Penn Central Transp. Co. v. City of New York (438 US 104), relied upon by Lenox Hill on this point, does not support its argument that to be deemed a taking a statute must affect the economically viable use of the property as a whole. The *Penn Central* court's reasoning that " '[t]aking' jurispru-

dence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated" refers to distinct physical segments of a particular parcel of land, which is consistent with its conclusion that there was no taking merely by virtue of the impaired value of the air rights above Grand Central Station (*id.*, at 130). The court was not referring to temporal interests in property, such as the reversionary interest involved here, which has, for centuries, been recognized as a discrete estate in Anglo-American law. (*See*, Powell, *Real Property* §266[1], at 19-17.) Lenox Hill's reliance on *Keystone Bituminous Coal Assn. v. DeBenedictis, supra* (480 US 470) is misplaced for the same reason. In *Keystone*, the challenged statute regulated only some of the physical elements of the property, i.e., the surface support area. Unlike here, a discrete temporal property interest was not involved.

More to the point, with respect to the argument that an owner's reversionary interest in rental apartments is not a sufficient component of property rights to support a deprivation of "economically viable use" in a regulatory takings claim, it is well settled that the three most essential elements of property ownership are the rights to " 'possess, use and dispose." (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 435, quoting *United States v. General Motors Corp.*, 323 US 373, 378; *Seawall Assocs. v. City of New York, supra*, 74 NY2d at 108.) The permanent deprivation of an owner's right to reenter and select the next tenant clearly implicates the right to possess and use.

In distinguishing this case from *Lenox Hill I*, the IAS court cited the fact that, unlike here, the reversionary interest there related to the right to dispose of condominium units, which had a measurable, quantifiable market value. This argument confuses the property right taken, as for instance, an owner's reversionary interest, with the monetary measure of the property right confiscated. The question of whether a taking has occurred is one issue; if it has, a separate inquiry is required to determine the appropriate compensation. (*See, Loretto v. Teleprompter Manhattan CATV Corp., supra*, 458 US at 441.)

While the value of the reversionary interest may be measured differently in the two cases, a taking nonetheless has occurred in both instances.

Lenox Hill, supported by the Attorney General, and citing *Matter of Cale Dev. Co. v. Conciliation & Appeals Bd.* (94 AD2d 229, *affd* 61 NY2d 976), *Koenig v. Jewish Child Care Assn.* (107 AD2d 542, *affd* 67 NY2d 955) and *Matter of Schwartz Landes Assocs. v. New York City Conciliation & Appeals Bd., supra* (117 AD2d 74) argues that it is entitled to renewal leases and the protection of the Rent Stabilization Law, without regard to chapter 940, on the basis of well established precedent which protects legitimate corporate tenancies as long as the subject premises are, in fact, utilized as the primary residence of the intended occupants.

This argument begs the question. In none of these cases did the court address the issue in terms of the "takings clause," which, in my view, is implicated whenever rent regulation provisions are interpreted so as to require the offer of renewal leases in perpetuity to a corporate tenant since such an interpretation deprives the landlord of an economically viable use of its property by abrogating the landlord's reversionary interest. Thus, quite apart from chapter 940, a regulatory taking would occur in this case. While no takings argument was made in *Cale*, which held that a corporate tenant was entitled to a renewal where the lease designated a specific individual and that individual actually used the apartment as his primary residence, the court did observe that "rent stabilization was never intended to place [a corporate tenant's] leasehold estate in perpetual trust for the benefit of whomever, at a particular point in time, might happen to occupy a corporate office" (94 AD2d at 234-235).

Finally, Lenox Hill argues that the owner is estopped from challenging the constitutionality of chapter 940 because it took full advantage of the 15% supplemental rent increase provided therein to landlords who lease apartments to not-for-profit hospitals for use by their staff. In its estoppel argument Lenox Hill invokes the general rule that a party may not obtain a benefit under a statute and later challenge the

statute's constitutionality. While the rule is correctly stated, its applicability is limited to those instances where a party has voluntarily subjected itself to the statute's application; it does not apply where as here, the statute's coverage has been thrust upon the party. *Fahey v. Mallonee* (332 US 245) illustrates the point. There, the plaintiffs, who had voluntarily formed a banking organization under section 5 of the Home Owner's Loan Act of 1933, thereafter challenged the constitutionality of section 5(d), which authorized the Federal Home Loan Bank Board to prescribe regulations for the reorganization, consolidation, merger or liquidation of building and loan associations with the power to appoint a conservator. Rejecting the challenge, the Court noted, "It would be intolerable that the Congress should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection." (*Id.* at 256; *see, also, State Div of Human Rights v. State of New York*, 62 AD2d 617, *appeal dismissed* 46 NY2d 939; *Armour Handcrafts v. Miami Decorating & Design Center*, 99 AD2d 521.) The distinction here is obvious. The owner, having acquired the building in question seven years before the enactment of chapter 940, did not voluntarily elect to be subject to its provisions.

Thus, in my view, the IAS court's interpretation of chapter 940 effects an unconstitutional taking of property without just compensation. Chapter 940 should be interpreted in a manner which brings it into harmony with the Constitution. (*People v. Dietze*, 75 NY2d 47, 52.) For the reasons expressed in *Lenox Hill I* (157 AD2d, at 151-153), I would interpret chapter 940 as requiring the owner to offer renewal leases to the Lenox Hill employees who occupied the subject apartments as their primary residences at the expiration of their most recent renewal leases. As was said in *Lenox Hill I*, "Such an interpretation results in the continued occupancy of these apartments by those persons occupying them as their primary residence for as long as they continue to do so. Since the renewal lease is offered to persons, rather than to Lenox Hill,

an institution with a virtually limitless existence, [the owner] has a reasonable expectation of a vacancy at some point. When such a vacancy occurs, it can exercise the prerogatives of ownership and determine how the property is to be used." (*Id.*, at 153.)

Accordingly, I would reverse, grant plaintiffs' motion for summary judgment on the first and second causes of action and declare in the owner's favor in accordance with the foregoing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: September 21, 1993

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Clerk

SUPREME COURT : NEW YORK COUNTY
IAS PART 14

Index No.
24431/91

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN and BARBARA MANOCHERIAN d/b/a FAME COMPANY,

Plaintiffs,

—against—

LENOX HILL HOSPITAL, a New York Not-For-Profit Corporation, THE STATE OF NEW YORK, T. O'CONNOR, C. ROGERS, D. HUCZEL, K. MOORE and M. KOLAN,

Defendants.

MYRIAN J. ALTMAN, J.:

In this consolidated action,[1] plaintiffs move for summary judgment in the form of a declaration that they are not required to offer renewal leases to defendant Lenox Hill Hospital (Lenox Hill) for six rent-stabilized apartments occupied by Lenox Hill employees. Plaintiffs challenge the constitutionality of Chapter 940, Laws of 1984 which amended the Rent Stabilization Law so as to require landlords to provide renewal leases to not-for-profit hospitals based on the primary

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[1] Plaintiffs moved for consolidation and for summary judgment in the separate action, *Manocherian v Lenox Hill Hospital* (index no. 1624/92). The parties stipulated to consolidate the two cases under index number 24431/91. The summary judgment motions are thus also consolidated for determination herein.

residency status of the hospital's employee-subtenant, rather than on the primary residency status of the tenant of record.

Both the State of New York and Lenox Hill cross-move for summary judgment, while Lenox Hill also cross-moves for leave to amend its answer to plead the affirmative defense of estoppel.

Plaintiffs own an apartment building located at 420 East 79th Street in Manhattan, which they purchased in 1976. During the 1960's Lenox Hill, a not-for-profit corporation and a private hospital, entered into leases for 18 apartments in plaintiffs' building for the purpose of subletting them to its employees, primarily nurses. Lenox Hill obtained regular lease renewals over the years on most of the apartments and presently is the tenant of record for a total of 15 apartments, all of which are subject to the Rent Stabilization Law.

Six of the leases have expired and notices of non-renewal of the leases have been served on Lenox Hill and the subtenants in residence. Apparently all but one of the apartments are occupied at the present time by Lenox Hill employees, although not the same employees who occupied the apartments as of the date of the last lease renewal. One apartment is allegedly vacant.

In an effort to prevent tenants from profiteering by subletting their rent-stabilized apartments, the Legislature enacted the Omnibus Housing Act of 1983 which added § 226-b to the Real Property Law and amended the Rent Stabilization Law. Pursuant to this new legislation, tenants were required to obtain the landlord's consent prior to subletting. The amount of rent a subtenant could be charged and the term of a sublease were also restricted (McKinney's Uncons Laws of NY § 26-511 [Rent Stabilization Law § 26-511]).[2] The Omnibus Housing Act further provided that the protections of the Rent Stabilization Law would be available only to a tenant named in the lease occupying an apartment as his or her primary residence, a definition which did not extend to subtenants or other occupants (Rent Stabilization Law § 26-

[2] Unless otherwise noted, all references are to the present statutory sections which were renumbered effective September 1, 1986.

504[a][1][f]). Thus, a landlord was no longer required to offer a renewal lease to a tenant of record who was not using the apartment as his or her primary residence.

The Legislature recognized that this restriction would adversely affect a corporate tenant such as Lenox Hill which does not use the apartments it rents as its primary residence, but subleases them to individuals who do. Therefore, it passed Chapter 940 of the Laws of 1984, amending § 8625(a)(11) of the Emergency Tenant Protection Act and Administrative Code § YY51-3.0 (renum § 26-504[a][1][f]). The amendments provided, *inter alia*:

> For the purposes of this subparagraph where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants . . .

Administrative Code § YY51-6.0 (renum § 26-511[c][12]) was also amended to provide that "a not-for-profit hospital shall have the right to sublet any housing accommodation leased by it to its affiliated personnel without requiring the landlord's consent". The amended section also restricted the landlord's right to limit the term of the sublease and provided that

> whenever a not-for-profit hospital executes a renewal lease for a housing accommodation, the legal regulated rent shall be increased by a sum equal to fifteen percent of the previous lease rental for such housing accommodation, hereinafter referred to as a vacancy surcharge, unless the landlord shall have received within the seven year period prior to the commencement date of such renewal lease any vacancy increases or vacancy surcharges allocable to the said housing accommodation

(Rent Stabilization Law § 26-511[c][12]).

By these amendments, the Legislature sought to ensure that not-for-profit hospitals could continue to supply their employees with affordable, convenient housing by regular renewal of

rent-stabilized leases. At the same time, the landlord would be allowed to recoup, in the form of a 15% vacancy surcharge, rent increases which might have been available had the apartments become vacant, rather than continuing to be rented under an uninterrupted series of renewal leases.

As a corporation in existence since 1917, Lenox Hill allegedly has a perpetual existence and will, presumably, always have employees in need of housing. Thus, plaintiffs claim that Chapter 940 entitles Lenox Hill to "perpetual renewal leases" for apartments it does not occupy thereby depriving plaintiffs of any "reasonable expectation of regaining possession of the apartments upon vacatur of the occupants." Plaintiffs challenge the constitutionality of Chapter 940 claiming that the alleged loss of their reversionary interest in the apartments constitutes a taking without just compensation.

Lenox Hill maintains that plaintiffs are estopped from challenging the constitutionality of Chapter 940 because, in collecting the 15% vacancy surcharge, plaintiffs have availed themselves of the benefits of the statute and cannot now object to it on constitutional grounds. Because estoppel was not affirmatively pleaded in the answer served by Lenox Hill, permission to amend that answer is sought.

Leave to amend pleadings should be freely given, in the absence of prejudice or surprise (CPLR 3025[b]; Blasch v Chrysler Motors Corp., 93 AD2d 934), neither of which has been shown. Leave to amend will not be granted, however, where the proposed amendment is without merit (Megaris Furs v Gimbel Bros., 172 AD2 209).

While it has been stated that " 'one who partakes of advantages which a statute affords is ordinarily barred from attacking the statute on constitutional grounds' [citations omitted]" (State Div. of Human Rights v State of New York, Executive Dept., Div. of State Police, 62 AD2d 617, 626, appeal dismissed 46 NY2d 939), that general rule is apparently no longer viable (see, Matter of Kovarsky v Housing & Development Admin. of City of N.Y., 31 NY2d 184, 192; Matter of Lemp v Town Bd. of Town of Islip, 90 Misc 2d 360). There-

fore, I find no merit to Lenox Hill's estoppel argument and leave to amend its answer is denied.

The Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that there shall be no taking of private property for public use without just compensation. This constitutional guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (Penn Cent. Transp. Co. v New York City, 438 US 104, 123, citing Armstrong v United States, 364 US 40, 49). No set test has been developed to determine when compensation will be due as a result of the imposition of governmental restrictions on property, although the "economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance" (Loretto v Teleprompter Manhattan CATV Corp., 458 US 419, 426). A taking "may more readily be found when the interference with property can be characterized as a physical invasion by government" (Penn Cent. Transp. Co. v New York City, *supra*, at 124) or where " 'the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership' " (Seawall Assocs. v City of New York, 74 NY2d 92, 102, cert denied 493 US 976, quoting Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv L Rev 1165, 1184 [1967]).

A "physical taking" of property by government action compels the property owner to "surrender the most basic attributes of private property, the rights of possession and exclusion" (Seawall Assocs. v City of New York, *supra*, at 102). Where government action results in a permanent physical occupation of property, there is a taking " 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner' " (Nollan v California Coastal Commn., 483 US 825, 831-832, citing Loretto v Teleprompter Manhattan CATV Corp., *supra*, at 434-435).

Governmental regulation of property falling short of a physical taking may nevertheless amount to a "regulatory taking": "(1) if it denies an owner economically viable use of his property, *or* (2) if it does not substantially advance legitimate State interests" (Seawall Assocs. V City of New York, *supra,* at 107 [emphasis in original]).

In claiming that Chapter 940 is unconstitutional, plaintiffs rely heavily on the decision of the Appellate Division, First Department in *520 E. 81st St. Assocs. v Lenox Hill Hosp.* (157 AD2d 138, revg 142 Misc 2d 723, revd on other grounds 77 NY2d 944). The Appellate Division addressed the constitutionality of Chapter 940 in an action between a landlord and Lenox Hill which parallels the facts of this case, except that the apartment building in *520 E. 81st St. Assocs.* had undergone conversion to a condominium form of ownership. The Supreme Court had found that Lenox Hill was entitled to renewal leases as the intended beneficiary of Chapter 940 and because the plaintiff landlord, unlike plaintiffs herein, had failed to provide proper statutory notice of its intention not to offer renewal leases (142 Misc 2d at 725). The IAS court declined to address the constitutional issue because the Attorney General had not been notified of the challenge, as is required by law (*id.*, at 726).

The Appellate Division reversed the IAS court and addressed the constitutionality of Chapter 940. The Court found that both a physical and regulatory taking would result if Lenox Hill were entitled to renewal leases. A physical taking was found to arise because Lenox Hill's corporate existence, its need for employee housing and its right to renewal leases were virtually perpetual, resulting in the permanent loss to plaintiff of its right to decide who occupies the property and on what terms and depriving plaintiff permanently "of the opportunity to sell the apartments free and clear of tenancies" (157 AD2d at 147-148).

The Appellate Division found a regulatory taking in that Chapter 940 "fails to advance, and indeed contravenes, the purpose of the Rent Stabilization Law to which it relates" (*id.*, at 149) because it permits Lenox Hill, as tenant of record, to

dislodge subtenants no longer employed by the hospital. Further, application of Chapter 940 to Lenox Hill "deprives the owner of the value of an important single element in its bundle of property rights, namely, the expectation of a residual/reversionary interest in these apartments, which has now been lost" (*id.*, at 150). Consequently, the owner was deprived of the resale value of the apartments (*id.*, at 151).

However, in an effort to sustain the constitutionality of Chapter 940, the Court rejected the IAS court's interpretation of the statute as requiring the landlord to offer renewal leases to Lenox Hill. Rather, the Appellate Division found that the statute required the landlord to offer renewal leases to Lenox Hill's subtenants, if they met the requirement of primary residency (*id.*, at 153). Since the renewal leases would be offered to individuals, rather than Lenox Hill, the plaintiff would have a reasonable expectation of vacancies at some time. The Court rejected Lenox Hill's argument that it was entitled to a renewal lease because the plaintiff had failed to serve a proper notice of nonrenewal.

The Appellate Division decision was reversed by the Court of Appeals (77 NY2d 944) which found that the landlord's failure to provide the statutory notice of nonrenewal required it to offer Lenox Hill renewal leases. Therefore, it was unnecessary for the Court to address the constitutional issue and the decision of the IAS court was reinstated.

Consequently, the Appellate Division's decision is not binding precedent, although it is, of course, entitled to serious consideration (see, 29 NY Jur 2d, Courts & Judges, § 483). There are two distinguishing factors present in this case which now compel a finding of constitutionality. After the Appellate Division rendered its decision, the Supreme Court of the United States decided a case entitled *Yee v City of Escondido* (___ US ___, 118 L Ed 2d 153). *Yee* effectively overruled *Hall v City of Santa Barbara* (797 F2d 1493, opn amended 833 F2d 1270, cert denied 485 US 940), one of the cases relied on by the Appellate Division in finding a physi-

cal taking. Additionally, this case involves a rental property whereas *520 E. 81st St. Assocs.* involved a condominium.[3]

The case of *Yee v City of Escondido* (*supra*) involved a challenge to a mobile home rent control ordinance brought by mobile home park owners. The local ordinance rolled back the rents that owners could charge for the rental of "pads" for mobile homes and prohibited rent increases without the City Council's approval. The local ordinance was passed after enactment of state legislation which strictly limited the bases upon which an owner could terminate a mobile home tenancy. The owner could not require removal of a mobile home when sold, charge a transfer fee for the sale or disapprove of a purchaser, unless the purchaser was unable to pay the rent. The purchaser could continue to rent the pad. The owners argued that, because of the state law, the local ordinance effectively deprived them of the use of their property and gave tenants and their successors the right to permanently occupy the property. The Supreme Court rejected the owners' argument and found that the ordinance did not result in a physical taking.[4]

In *Seawall Assocs. v City of New York* (*supra*), the regulation under scrutiny prevented owners of single-room occupancy (SRO) housing from demolishing their buildings and required them instead to rehabilitate their properties and lease every unit to "bona fide" tenants or risk substantial penalties. Alternatively, owners could purchase exemptions for a large fee. The Court of Appeals found that the SRO owners would be "forced" by the government to rent their properties to strangers, a compelling case for finding a physical taking. The *Seawall* Court contrasted the SRO owners' loss of their "fundamental rights to possess and to exclude" with "rent control and other landlord-tenant regulations" that had been upheld which "merely involved restrictions imposed on existing ten-

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[3] Further, by reinstating the lower court decision, the Court of Appeals apparently also approved the finding of the IAS court that renewal leases are to be offered to the hospital and not to the subtenants.

[4] For procedural reasons, the Court did not consider whether there was a regulatory taking.

ancies where the landlords had voluntarily put their properties to use for residential housing" (*id.*, at 105).

In *Yee* (*supra*), the Supreme Court reiterated that the regulation of a landlord-tenant relationship voluntarily entered into by the owner, and not forced upon it by the government, does not create a physical taking because such a relationship lacks the "required acquiescence" which "is at the heart of the concept of occupation" (*id.*, at 165).

Unlike the owners in *Seawall* or in *Loretto v Teleprompter Manhattan CATV Corp.* (*supra*),[5] plaintiffs herein voluntarily opened their premises to the occupancy to which they now object. They were not compelled to become residential landlords, but rented their apartments to Lenox Hill knowing that they would be occupied by hospital employees. Chapter 940 does not force plaintiffs to open their property to strangers, but rather, compels them to continue to lease the apartments to their chosen tenant as long as requirements of primary residency are met, just as in the case of an individual tenant in occupancy. Plaintiffs may be deprived of the ability to select a particular subtenant, but they have not been deprived of any opportunity to sell the apartments free of tenancies since this is a rental building (compare, 520 E. 81st St. Assocs. v Lenox Hill Hosp., 157 AD2d at 148).

The right to exclude is "one of the most treasured strands in an owner's bundle of rights" (Loretto v Teleprompter Manhattan CATV Corp., *supra*, at 435). Plaintiffs claim that Chapter 940 wrests from them their right to exclude. In actuality, since plaintiffs voluntarily opened their property to occupancy by others, they "cannot assert a per se right to compensation based on their inability to exclude particular individuals" (*Yee v City of Escondido, supra*, at 167). Regulations which require a landowner to accept tenants he or she does not like or which restrict the amount of collectible rents, such as Chapter 940, do not amount per se to a physical taking (see, *id.*, at 166).

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[5] In *Loretto*, the owner was required by law to permit a cable television company to install cable equipment on her property.

Plaintiffs have failed to show the loss in perpetuity of their reversionary interest in their property or that the statute requires them to "refrain in perpetuity from terminating a tenancy", which could amount to a physical taking (*Yee v City of Escondido, supra,* at 166). Plaintiffs have not demonstrated that any of the avenues for changing the use of their property, such as proposed occupancy by the owners themselves, have been closed to them or that they "are not in fact free to change the use of their land" (*id.,* at 165; compare, Seawall Assocs. v City of New York, *supra*). The fact that an apartment is occupied by an individual tenant of record rather than by a subtenant of a not-for-profit hospital of potentially perpetual existence does not guarantee that the apartment will ever become vacant. The Rent Stabilization Law allows continuing occupancy by primary resident tenants and their family members under circumstances which might very well be perpetual. On the other hand, it also provides for the loss of a nonprofit hospital's renewal rights if its subtenants fail to meet the test of primary residency or if the apartments are vacant during the crucial period, so that no subtenant exists whose residency must be addressed. Further, plaintiffs' reversionary interest here does not include the right to sell the apartments. Plaintiffs would continue to rent the apartments at issue, even if Lenox Hill were not the tenant of record.

For all of the above reasons, I find that Chapter 940 does not effect a physical taking (see, *Yee v City of Escondido, supra*).

Determination of whether a regulatory taking has occurred requires "essentially ad hoc, factual inquiries" (Penn Cent. Transp. Co. v New York City, *supra,* at 124; *Yee v City of Escondido, supra*). Regulation which goes too far will be recognized as a taking (*Yee v City of Escondido, supra,* at 166, citing Pennsylvania Coal Co. v Mahon, 260 US 393, 415). Land use regulation will not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his or her land (Nollan v California Coastal Commn., *supra,* at 834). A use restriction may constitute a taking if it is not reasonably necessary to

effectuate a substantial government purpose, although a broad range of governmental purposes are acceptable (*id.*, at 834-835). Legislative enactments carry a strong presumption of constitutionality and a court should not concern itself with questions of "reasonableness, wisdom and propriety" (Lincoln Bldg. Assocs. v Barr, 1 NY2d 413, 415, appeal dismissed 355 US 12). The party challenging the statute has the burden of rebutting this presumption (*id.*, at 418). In this case, plaintiffs have failed to do so.

A principal goal of the Rent Stabilization Law is to curb oppressive conduct and profiteering by landlords (see, Rent Stabilization Law § 26-501). That goal is advanced by providing protection to Lenox Hill and its employees. A landlord should not be permitted to rent its premises to a nonprofit entity such as Lenox Hill and then be heard to complain that it had not foreseen the occupancy of the property by the very persons intended by the lease to occupy the premises. Further, Chapter 940 promotes the general health and welfare of the public that the Rent Stabilization Law, which addressed the housing shortage in the City, was designed to protect. During what is considered to be a continuing emergency in the residential rental market, the legislation permits nonprofit hospitals to obtain housing for their medical personnel which might not otherwise be available. There is no question but that the apartments are in fact rented to hospital employees. Thus, it is ultimately residential tenants who are being protected. Consequently, I find a sufficiently "close nexus" between the regulation and the end sought to be accomplished by the Rent Stabilization Law (compare, Seawall Assocs. v City of New York, *supra*, at 111).

As previously indicated, the Omnibus Housing Act of 1983 was enacted, in part, to prevent tenant profiteering. Lenox Hill is not using the apartments to make a profit. Therefore, it was reasonable for the Legislature to exempt nonprofit hospitals such as Lenox Hill from the 1983 restrictions.

Consequently, I find that plaintiffs have failed to demonstrate that Chapter 940 does not further the purposes of the Rent Stabilization Law and that, in fact, the legislation does

substantially promote legitimate state interests (but see, 520 E. 81st St. Assocs. V Lenox Hill Hosp., 157 AD2d 138, *supra*).

Nor have plaintiffs demonstrated that they have been denied economically viable use of their property. As previously discussed, plaintiffs have not shown that they have been deprived of their reversionary interest in the apartments any more so than if the apartments were rented to individuals. There has been no showing that the value of any reversionary interest in a rent-stabilized apartment is substantially less when the tenant is a not-for-profit hospital as opposed to an individual. Plaintiffs have collected and will continue to collect a surcharge, otherwise unavailable to a landlord when an apartment is continually occupied by the same rent-stabilized tenant.

Further, plaintiffs did not invest in this property with the expectation of selling the units (compare, 520 E. 81st St. Assocs. v Lenox Hill Hosp., 157 AD2d at 151). They are not presently seeking to sell the apartments, but to rerent them. Plaintiffs purchased the building with knowledge of Lenox Hill's leases and prior to the enactment of the Omnibus Housing Act of 1983. Chapter 940 was passed shortly after the 1983 legislation went into effect. The brief period of time between the enactment of the 1983 and 1984 laws was insufficient to give rise to any reasonable expectation of recovering the apartments. Thus, plaintiffs have not been frustrated in their "distinct investment-backed expectations" (see, Penn Cent. Transp. Co. v New York City, *supra*, at 124).

Plaintiffs have not expressed any desire to alter the use of their property, nor have they claimed that Chapter 940 prohibits them from doing so (compare, Seawall Assocs. v City of New York, *supra*). Chapter 940 merely restricts plaintiffs' conduct; it does not affirmatively require them to "dedicate their properties to a public purpose" (compare, *id.*, at 114). Plaintiffs have not demonstrated that the law denies them the full use of their property or a reasonable return on their investment (see, *id.*, at 108-109). Consequently, I find that Chapter 940 does not effect a regulatory taking.

Finally, plaintiff's claim that apartment 16-G was unoccupied when the lease for that apartment expired is uncontroverted. Thus, they seek a final judgment of possession for the apartment. However, it appears that the apartment was occupied by a Lenox Hill employee during the crucial 30-day notice period for the offering, or refusal, of a renewal lease. Chapter 940 has made the subtenant in occupancy the party whose primary residency status controls Lenox Hill's right to renew. The landlord bears the burden of proving that grounds for removal existed during the 30-day notice period, not after the lease expired. Thus, the primary residency of Lenox Hill's subtenant as of the time of the notice of nonrenewal would have to be considered (see, Keller v Panneton, 121 Misc 2d 381). The facts concerning that person's entire residency would have to be reviewed to determine Lenox Hill's right to renewal (see, Ansonia Assocs. v Consiglio, 163 AD2d 98). Since plaintiffs have not alleged that any of the Lenox Hill subtenants, much less the former occupant of 16-G, did not occupy their apartments as their primary residences, plaintiffs are not entitled to a judgment of possession for apartment 16-G and have no grounds on which to deny Lenox Hill renewal leases to any of the apartments.

Accordingly, plaintiffs' motions for summary judgment are denied and defendants' cross-motions are granted. Lenox Hill's cross motion seeking leave to amend is denied. As to plaintiffs' first and second causes of action in each of the complaints, defendants are entitled to a declaration that Chapter 940, Laws of 1984 is constitutional and a declaration that Lenox Hill is the primary resident of the apartments in issue and is entitled to renewal leases. All the remaining causes of action in this consolidated action are dismissed. Lenox Hill is not entitled to recover attorneys' fees as sought in its counterclaims (see, Peck v Wolf, 157 AD2d 535, lv to appeal denied 75 NY2d 709) and therefore the counterclaims are dismissed.

Settle order and judgment.

Dated: July 6, 1992

J. S. C.

UNITED STATES CONSTITUTION

The Takings Clause of the Fifth Amendment of the United States Constitution provides:

> [N]or shall private property be taken for public use without just compensation.

LAWS OF NEW YORK

EMERGENCY TENANT PROTECTION ACT

Memorandum relating to this chapter, see Executive Memoranda, post

CHAPTER 403

Approved June 30, 1983, effective as provided in section 64

Passed on message of necessity. See Const. Art. IX, § 2(b)(2), and McKinney's Legislative Law § 44

* * *

§ 41. Subdivision a of section YY51-3.0 of the administrative code of the city of New York, as amended by chapter five hundred seventy-six of the laws of nineteen hundred seventy-four, the opening paragraph as amended by chapter five hundred fifty-five of the laws of nineteen hundred eighty-two, is amended to read as follows:

a. Class A multiple dwellings not owned as a cooperative or as a condominium, except as provided in section three hundred fifty-two-eeee of the general business law, containing six or more dwelling units which:

(1) were completed after February first, nineteen hundred forty-seven, except dwelling units (a) owned or leased by, or financed by loans from, a public agency or public benefit corporation, (b) subject to rent regulation under the private housing finance law or any other state law, (c) aided by government insurance under any provision of the National Housing Act,[1] to the extent this local law or any regulation or order issued thereunder is inconsistent therewith, or (d) located in a building for which a certificate of occupancy is obtained after March tenth, nineteen hundred sixty-nine; or (e) any class A multiple dwelling which on June first, nine-

[1] 12 U.S.C.A. § 1701 et seq.

teen hundred sixty-eight was and still is commonly regarded as a hotel, transient hotel or residential hotel, and which customarily provides hotel service such as maid service, furnishing and laundering of linen, telephone and bell boy service, secretarial or desk service and use and upkeep of furniture and fixtures, or (f) not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction, provided, however that no action or proceeding shall be commenced seeking to recover possession on the ground that a housing accommodation is not occupied by the tenant as his primary residence unless the owner or lessor shall have given thirty days notice to the tenant of his intention to commence such action or proceeding on such grounds, or (g) became vacant on or after June thirtieth, nineteen hundred seventy-one, or become vacant, provided however, that this exemption shall not apply or become effective with respect to housing accommodations which the commissioner determines or finds became vacant because the landlord or any person acting on his behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including but not limited to, interruption or discontinuance of essential services) which interferred with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations and provided further that any housing accommodations exempted by this paragraph (g) shall be subject to this law to the extent provided in subdivision b of this section; or (2) were decontrolled by the city rent agency pursuant to section Y51-12.0 of the city rent and rehabilitation law; or (3) are exempt from control by virtue of items (1), (2), (6) or (7) of subparagraph (i) of paragraph 2 of subdivision e of section Y51-3.0 of such law.

§ 64. This act shall take effect immediately except that sections two through twelve, fourteen, fifteen, sixteen, eighteen through thirty-five, forty-one and forty-two shall take effect April first, nineteen hundred eighty-four, section thirty-six shall take effect September first, nineteen hundred eighty-

three, section forty shall take effect August first, nineteen hundred eighty-three and provided that sections thirty-four and thirty-five shall apply to actions and proceedings commencing on and after the date on which such sections have become a law, that sections forty-four, forty-five, forty-eight and fifty-six shall apply to leases and renewals commencing on and after October first, nineteen hundred eighty-three and that the division of housing and community renewal may take required and appropriate actions for timely implementation of this act.

EMERGENCY TENANT PROTECTION ACT— SUBLETTING OF RESIDENCES BY NOT-FOR-PROFIT HOSPITALS

CHAPTER 940

Approved Aug. 6, 1984, effective as provided in section 5

AN ACT to amend the administrative code of the city of New York and the emergency tenant protection act of nineteen seventy-four, in relation to subletting of residences by not-for-profit hospitals

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subparagraph (f) of paragraph one of subdivision a of section YY51-3.0 of the administrative code of the city of New York, as amended by chapter four hundred three of the laws of nineteen hundred eighty-three, is amended to read as follows:

(f) not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction, provided, however that no action or proceeding shall be commenced seeking to recover possession on the ground that a housing accommodation is not occupied by the tenant as his primary residence unless the owner or lessor shall have given thirty days notice to the tenant of his intention to commence such action or proceeding on such grounds. For the purposes of this subparagraph (f) where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants, or

§ 2. Paragraph twelve of subdivision c of section YY51-6.0 of such code, as added by chapter four hundred three of the laws of nineteen hundred eighty-three, is amended to read as follows:

(12) permits subletting of units subject to this law pursuant to section two hundred twenty-six-b of the real property law provided that (a) the rental charged to the subtenant does not exceed the stabilized rent plus a ten percent surcharge payable to the tenant if the unit sublet was furnished with the tenant's furniture; (b) the tenant can establish that at all times he has maintained the unit as his primary residence and intends to occupy it as such at the expiration of the sublease; (c) an owner may terminate the tenancy of a tenant who sublets or assigns contrary to the terms of this paragraph but no action or proceeding based on the non-primary residence of a tenant may be commenced prior to the expiration date of his lease; (d) where an apartment is sublet the prime tenant shall retain the right to a renewal lease and the rights and status of a tenant in occupancy as they relate to conversion to condominium or cooperative ownership; (e) where a tenant violates the provisions of subparagraph (a) of this paragraph the subtenant shall be entitled to damages of three times the overcharge and may also be awarded attorneys fees and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five [thouand] thousand four of the civil practice law and rules; (f) the tenant may not sublet the unit for more than a total of two years, including the term of the proposed sublease, out of the four-year period preceding the termination date of the proposed sublease. The provisions of this subparagraph (f) shall only apply to subleases commencing on and after July first, nineteen hundred eighty-three; [and] (g) for the purposes of this paragraph only, the term of the proposed sublease may extend beyond the term of the tenant's lease. In such event, such sublease shall be subject to the tenant's right to a renewal lease. The subtenant shall have no right to a renewal lease. It shall be unreasonable for an owner to refuse to consent to a sublease solely because such sublease extends beyond the tenant's lease; and (h) notwithstanding the provisions of section two hundred twenty-six-b of the real property law, a not-for-profit hospital shall have the right to sublet any housing accommodation leased by it to its affiliated personnel without requiring the

landlord's consent to any such sublease and without being bound by the provisions of subparagraphs (b), (c) and (f) of this paragraph. Commencing with the effective date of this subparagraph, whenever a not-for-profit hospital executes a renewal lease for a housing accommodation, the legal regulated rent shall be increased by a sum equal to fifteen percent of the previous lease rental for such housing accommodation, hereinafter referred to as a vacancy surcharge, unless the landlord shall have received within the seven year period prior to the commencement date of such renewal lease any vacancy increases or vacancy surcharges allocable to the said housing accommodation. In the event the landlord shall have received any such vacancy increases or vacancy surcharges during such seven year period, the vacancy surcharge shall be reduced by the amount received by any such vacancy increase or vacancy surcharges.

§ 3. Paragraph eleven of subdivision a of section five of section four of chapter five hundred seventy-six of the laws of nineteen hundred seventy-four constituting the emergency tenant protection act of nineteen seventy-four, as amended by chapter four hundred three of the laws of nineteen hundred eighty-three, is amended to read as follows:

(11) housing accommodations which are not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction. For the purposes of this paragraph, where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants. No action or proceeding shall be commenced seeking to recover possession on the ground that a housing accommodation is not occupied by the tenant as his primary residence unless the owner or lessor shall have given thirty days notice to the tenant of his intention to commence such action or proceeding on such grounds.

§ 4. Section ten-a of such act, as added by chapter four hundred three of the laws of nineteen hundred eighty-three, is amended to read as follows:

§ 10-a. Right to sublease. Units subject to this law may be sublet pursuant to section two hundred twenty-six-b of the real property law provided that (a) the rental charged to the subtenant does not exceed the legal regulated rent plus a ten percent surcharge payable to the tenant if the unit sublet was furnished with the tenant's furniture; (b) the tenant can establish that at all times he has maintained the unit as his primary residence and intends to occupy it as such at the expiration of the sublease; (c) an owner may terminate the tenancy of a tenant who sublets or assigns contrary to the terms of this section but no action or proceeding based on the non-primary residence of a tenant may be commenced prior to the expiration date of his lease; (d) where an apartment is sublet the prime tenant shall retain the right to a renewal lease and the rights and status of a tenant in occupancy as they relate to conversion to condominium or cooperative ownership; (e) where a tenant violates the provisions of subdivision (a) of this section the subtenant shall be entitled to damages of three times the overcharge and may also be awarded attorneys fees and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules; (f) the tenant may not sublet the unit for more than a total of two years, including the term of the proposed sublease, out of the four-year period preceding the termination date of the proposed sublease. The provisions of this subdivision (f) shall only apply to subleases commencing on and after July first, nineteen hundred eighty-three; [and] (g) for the purposes of this section only, the term of the proposed sublease may extend beyond the term of the tenant's lease. In such event, such sublease shall be subject to the tenant's right to a renewal lease. The subtenant shall have no right to a renewal lease. It shall be unreasonable for an owner to refuse to consent to a sublease solely because such sublease extends beyond the tenant's lease; and (h) notwithstanding the provisions of section two hundred twenty-six-b

of the real property law, a not-for-profit hospital shall have the right to sublet any housing accommodation leased by it to its affiliated personnel without requiring the landlord's consent to any such sublease and without being bound by the provisions of subdivisions (b), (c) and (f) of this section. Commencing with the effective date of this subdivision, whenever a not-for-profit hospital executes a renewal lease for a housing accommodation, the legal regulated rent shall be increased by a sum equal to fifteen percent of the previous lease rental for such housing accommodation, hereinafter referred to as a vacancy surcharge, unless the landlord shall have received within the seven year period prior to the commencement date of such renewal lease any vacancy increases or vacancy surcharges allocable to the said housing accommodation. In the event the landlord shall have received any such vacancy increases or vacancy surcharges during such seven year period, the vacancy surcharge shall be reduced by the amount received by any such vacancy increase or vacancy surcharges.

§ 5. This act shall take effect immediately and shall apply to all actions and proceedings pending on the effective date of this act or commenced thereafter and provided further that the amendments to sections YY51-3.0 and YY51-6.0 of the rent stabilization law of nineteen hundred sixty-nine[1] made by sections one and two of this act shall expire on the same date as such law expires and shall not affect the expiration of such law as provided under section YY51-8.0 of such law and provided further that the amendments to sections five and ten-a of the emergency tenant protection act of nineteen seventy-four[2] made by sections three and four of this act shall expire on the same date as such act expires and shall not affect the expiration of such act as enacted by chapter five hundred seventy-six of the laws of nineteen hundred seventy-four, as last extended by chapter four hundred three of the laws of nineteen hundred eighty-three.

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1 McK.Unconsol.Laws §§ YY51-3.0; YY51-6.0

2 McK.Unconsol.Laws §§ 8625; 8630-a.

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
APR 19 1995
OFFICE OF THE CLERK

October Term, 1994

—♦—

LENOX HILL HOSPITAL, A NEW YORK NOT-FOR PROFIT CORPORATION,

Petitioner,

-against-

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN, and BARBARA MANOCHERIAN, d/b/a/ FAME COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

If this Court grants the writ of certiorari sought, the following question will be presented for review:

1. Was the New York Court of Appeals correct in determining as a matter of New York State law that L. 1984, ch. 940 failed to substantially advance a legitimate state interest, and in fact contravened the primary intent of New York City's Rent Stabilization Law (the statute it amended) by encouraging the eviction of long-term residential occupants?

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Nos. 94-1555
94-1560

In The

Supreme Court of the United States

October Term, 1994

—♦—

LENOX HILL HOSPITAL, A NEW YORK NOT-FOR-PROFIT CORPORATION,

Petitioner,

-against-

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN, and BARBARA MANOCHERIAN, d/b/a/ FAME COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

This brief is submitted in opposition to the petitions for a writ of certiorari submitted on behalf of petitioner Lenox Hill Hospital ("Lenox Hill") and petitioner The State of New York (the "State").

The parties on whose behalf this brief is submitted are respondents Amir Manocherian *et al.* ("respondent"). The matter which is the subject of the petitions and this brief in opposition is *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385 (1994).

The petitions should be denied because the judgment appealed from is not final within the meaning of 28 U.S.C. § 1257(a). In addition, the judgment in question turns on a finding by the New York Court of Appeals that L. 1984, ch. 940 (hereinafter, "ch. 940") failed to substantially advance a legitimate state interest. The respondent respectfully submits that a determination by New York State's highest court regarding the nexus between the means and ends of a state statute is a unique state law determination to which, upon a negative finding, this Court should defer.

Finally, certiorari should be denied because the petitioners have failed to establish that the factual and legal issues involved herein merit the extraordinary relief sought.

JURISDICTION

The Judgment in Question is Not Final Under 28 U.S.C. § 1257(a)

The petitioners conclusorily allege that the Court has jurisdiction to review the judgment below under 28 U.S.C. § 1257(a). Petitioner Lenox Hill asserts, under authority of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that the underlying "decision is final ... since the New York Court of Appeals has conclusively invalidated a state statute as violative of the Takings Clause of the United States Constitution and thereby finally deprived petitioner of its rights under the state law." Lenox Hill Pet., at pp. 1-2. In fact, *Cox* establishes that the judgment of New York Court of Appeals is not final, and that this Court lacks jurisdiction under 28 U.S.C. § 1257(a).

The underlying action originally involved two separate complaints. The first complaint pertained to five of the six apartments at issue (R 114-36). The complaint alleged 14 causes of action, as follows:

Cause of Action	Relief Sought
First	Declaration of unconstitutionality regarding L. 1984, ch. 940.
Second	Declaration of non-primary residence against Lenox Hill.
Third through Seventh	Judgment of possession against each of the five apartments.

Eighth	Attorneys' fees and costs under 42 U.S.C. §1988.[1]
Ninth through Thirteenth	Use and occupancy for each of the five apartments.
Fourteenth	Attorneys' fees.

After issue was joined, the respondent moved for summary judgment on the first through seventh causes of action, or, in the alternative, for summary judgment on the first, second and sixth causes of action (R 31-32)[2]

The second complaint related solely to Apartment 3F (R 188-97). The complaint alleged five causes of action, as follows:

Cause of Action	Relief Sought
First	Declaration of unconstitutionality regarding L. 1984, ch. 940.
Second	Declaration of non-primary residence against Lenox Hill.
Third	Judgment of possession against Apartment 3F.
Fourth	Use and occupancy for Apartment 3F.
Fifth	Attorneys' fees.

After issue was joined as to the second complaint, the respondent moved for summary judgment on the first, second and third causes of action or, in the alternative,

---

[1] Pursuant to a December, 1991 stipulation, the parties agreed that the Eighth cause of action, seeking a § 1988 award against the State, would be discontinued, without prejudice (R. 158-59).

[2] The sixth cause of action sought a judgment of possession with respect to Apartment 16G (R 126).

for summary judgment on the first and second causes of action (R 160-161).

The judgment of the New York Court of Appeals, by declaring ch. 940 to be unconstitutional, granted summary judgment to the respondent on the first cause of action in each complaint; all of the other issues remain undecided. The Court's October 20, 1994 judgment remitted the case "to Supreme Court, New York County, for further proceedings in accordance with the opinion herein." App. 44a.[3] More specifically, the final paragraph of the majority's order and decision stated:

> "Accordingly, the order of the Appellate Division should be reversed, with costs, and Chapter 940 of the Laws of 1984 declared unconstitutional and the case should be remitted to Supreme Court, New York County, for such further proceedings as may be necessary and appropriate to resolve rights and remedies among the parties to this litigation affected by the holding of this case."

App. 16a.

It is Lenox Hill's position herein (despite its claim of finality), and in the remitted proceeding, that the judgment of the New York Court of Appeals had little bearing on the underlying issue of which party is entitled to possession of the six disputed apartments. Lenox Hill asserts in its petition that ch. 940 was enacted solely "in an excess of caution," and that independent of that

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[3] The petitioners utilize different paginations in their respective appendices. Unless otherwise indicated, all references to the appendix shall refer to the pagination in the petition filed by petitioner Lenox Hill.

enactment "[a] long line of cases in New York had previously held that a corporation could lease rent-stabilized apartments for the use of their employees and obtain renewal leases." Lenox Hill Pet., at pp. 4-5. In short, Lenox Hill asserts that irrespective of the judgment herein, it can still prevail in the remitted proceeding on nonfederal grounds.

It is settled that a judgment will not be deemed final for purposes of 28 U.S.C. §1257(a) where, as here, "anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In *Cox*, the Court identified four exceptions to this rule. *Id.* at 477-83. Lenox Hill and the State, however, fail to identify which of the four exceptions allegedly applies to the instant case. What is apparent is that this case does not fall under any of the first three exceptions enumerated in *Cox*.

Only the fourth exception is arguably implicated herein. In *Cox*, the Court described the fourth exception as follows:

> "Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant

> cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation."

Id. at 482-83 (emphasis supplied).

Cases expanding upon the underscored language establish why the fourth exception does not apply to the instant case. Quite simply, the failure to review the judgment herein will not "seriously erode federal policy"; indeed, no "federal policy" is at issue. In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), the Court observed that "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Id.* at 55. The Court held that a challenge to the constitutionality of the use of RICO statutes to criminalize patterns of obscenity offenses "calls into question the legitimacy of law enforcement practices of several States, as well as the Federal Government." *Id.* at 55-56. No First Amendment or law enforcement issues are implicated herein. Moreover, the rent stabilization statute at issue is wholly peculiar to New York State.

Similarly, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), the Court held that the failure to review a decision of the Ohio Supreme Court relating to

workers' compensation "might seriously erode federal policy in the area of nuclear production," which policy enjoyed federal pre-emption status. *Id.* at 179. No such pre-emptive federal policy is at issue here.

More analogous to the instant case is *Flynt v. Ohio*, 551 U.S. 619 (1981), wherein the Court held that a judgment of the Ohio Supreme Court on the federal defense of selective enforcement did not implicate a "federal policy" for purposes of the fourth exception:

> "Here there is no identifiable federal policy that will suffer if the state criminal proceeding goes forward. The question presented for review is whether on this record the decision to prosecute petitioners was selective or discriminatory in violation of the Equal Protection Clause. The resolution of this question can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth exception to swallow the rule."

Id. at 622.

Clearly, the federal government has no identifiable policy with respect to the Takings Clause. As such, this case does not fall within any of the *Cox* exceptions, and the judgment from which review is sought is not final pursuant to 28 U.S.C. §1257(a).

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 75a-83a of the petition filed by the State.

The respondent adds that the Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be deprived of "property ... without due process of law."

COUNTERSTATEMENT OF THE CASE

This case concerns the narrow issue of whether L. 1984, ch. 940 ("ch. 940"), an amendment to New York City's Rent Stabilization Law, substantially advances a legitimate state interest. The New York Court of Appeals, *inter alia,* having duly determined that the primary purpose of the Rent Stabilization Law was to protect the occupancy rights of long-term tenants, held that the enactment in question contravened the Rent Stabilization Law by encouraging evictions. Because ch. 940 did not substantially advance a legitimate state interest, the enactment was declared unconstitutional.

For a concise description of the underlying facts of the case up through the Appellate Division proceedings, including an analysis of the relevant statutes, the Court is respectfully referred to Section I of the Court of Appeals' October 20, 1994 order and opinion. App. 5a-7a.

The Court of Appeals, by 5-2 majority, declared ch. 940 to be unconstitutional. Applying the nexus test established in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Court held that ch. 940 failed to substantially advance a legitimate state interest. The Court of Appeals had been applying the nexus test in similar challenges since 1989. See, *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (1989), *cert. denied sub nom. Wilkerson v. Seawall Assocs.*, 493 U.S. 976 (1989); *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156 (1993), *cert. denied* _____U.S._____, 114 S.Ct. 2693 (1994).

The case turned on the Court of Appeals' interpretation of the underlying goals of the Rent

Stabilization Law, the statute ch. 940 purported to amend. The majority not only found that ch. 940 failed to substantially advance these goals, but in fact contravened them. Ch. 940 only protected Lenox Hill's tenancies if the apartment was occupied by an "affiliate" of the Hospital. This meant that if an affiliate left Lenox Hill's employ, *i.e.*, if the affiliate retired, changed professions or switched employers, Lenox Hill would have to evict the occupant in order to retain the apartment. The Court of Appeals stated:

> "Indeed, in significant respects, the particular statute contradicts two key goals of the RSL, to wit, occupant protection and eventual market redemption. These incongruities flow out of the transferral of power from a landlord to the employer of the actual occupants, and by the removal of the affected apartments entirely and permanently from marketplace availability or potentiality for other publicly interested or vying occupants at rent-stabilized rates.
>
> The preservation of this Manhattan Upper East Side housing enclave for this privileged entity's benefit, albeit one engaged in a laudable and necessary eleemosynary health service function, cannot masquerade as general welfare legislation. Purporting to promote the general public welfare by enabling not-for-profit hospitals to continue to provide subsidized housing benefits to its chosen employees cannot sustain the sweep and manner of the burden and confiscation effected against the few owners. Dissenting Justice Joseph P.

Sullivan aptly framed the consequences as follows:

> 'A statutory interpretation which encourages the deployment of rent stabilized apartments in perpetuity as temporary dormitory space for an ever changing roster of hospital employees and promotes the displacement of these employees, some of whom may be long-term tenants, when they leave their employment does a disservice to rent stabilization's underlying purpose of protecting residential tenants from evictions during an acute housing shortage (196 A.D.2d 728, 732).'"

App. 10a.

The Court also held:

> "The central, underlying purpose of the RSL is to ameliorate the dislocations and risk of widespread lack of suitable dwellings. Chapter 940 does not contribute to that desirable altruistic aim. It affects a tiny number of dwelling units. The effect of the statute is also quite ephemeral. These apartments were subject to rent stabilization prior to the enactment and will remain so, irrespective of the outcome of this long-standing dispute affecting a dwindling number of apartments, still in controversy in this litigation, with respect to the hospital's prime tenancy lease renewal entitlements. Accordingly, Chapter 940 fails to substantially or functionally prevent or relate to excessive rents and profiteering.

> The realistic appraisal of Chapter 940 shows that it was sought and designed essentially to subsidize the non-profit hospitals [sic] special fringe benefit to some of its special health care employees. This common employer-employee dilemma has no legally or legitimately cognizable, causal relationship to the governmental intrusion on rights and entitlements due owners in the use and enjoyment of their properties in a rental market where demand intractably exceeds supply at affordable levels. Chapter 940 is really interposed as a special housing program, privately funded through those owners who happen to have previously rented to not-for-profit hospitals, like Lenox Hill Hospital."

Id. at 11a-12a.

SUMMARY OF REASONS FOR DENYING THE WRITS

1. In the judgment in question, the New York Court of Appeals determined that ch. 940 did not substantially advance the primary goals of New York City's Rent Stabilization Law, the statute ch. 940 amended. A determination by New York State's highest court regarding the nexus between the means and ends of the Rent Stabilization Law and ch. 940 is a unique state law determination to which, upon a negative finding, this Court should defer. Moreover, the peculiarities of New York City's Rent Stabilization Law, as well as the unusual factual setting herein, make this case inappropriate for review.

2. The Court of Appeals properly invoked the nexus test in the instant case in full accord with well-established precedent. See, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Dolan v. City of Tigard*, ____U.S.____, 114 Ct. 2309 (1994).

3. The Court of Appeals properly considered -- and rejected -- Lenox Hill's claim that ch. 940 provided just compensation for the taking of respondent's property.

REASONS FOR DENYING THE WRITS

I

The Unique Nature of Both L. 1984, Ch. 940 and the Rent Stabilization Law Makes This Case Inappropriate for Review by This Court

In the judgment below, the New York Court of Appeals held that ch. 940, which purportedly amended the Rent Stabilization Law, failed to substantially advance a legitimate state interest. App. 7a-14a. In so holding, the Court of Appeals was required to (1) interpret the Rent Stabilization Law and determine its principal goals; (2) determine the practical and functional effect of ch. 940, and (3) determine whether ch. 940 substantially advanced those goals.

There are few laws more limited in application or peculiar than New York City's Rent Stabilization Law, which has been described as an "impenetrable thicket, confusing not only to lawyers but to laymen." *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 70 (1981), quoting *Matter of 89 Christopher v. Joy*, 35 N.Y.2d 213, 220 (1974). Even more limited and peculiar is ch. 940, which applies solely to not-for-profit hospitals which lease rent stabilized apartments in New York and then sublet them to their affiliates. As the Court of Appeals correctly observed below, ch. 940 was enacted at the request of petitioner Lenox Hill, who was its "primary and real beneficiary." App. 6a. Irrespective of its questionable genesis, ch. 940 reflects little more than the social, political and housing concerns of a particular locality.

The respondent respectfully submits that a determination by New York State's highest court regarding the nexus between the means and ends of a local statute is a unique state law determination to which, on a negative finding, this Court should defer. Certainly, the extraordinary jurisdiction of the Court should not be invoked to determine whether the Court of Appeals correctly determined the principal goals of the Rent Stabilization Law, or whether ch. 940 substantially advanced those goals. Because this case does not involve matters of national interest, and implicates no federal policy, certiorari should be denied.

II

The Court of Appeals Applied the Proper Standard

In the judgment below, the New York Court of Appeals declared ch. 940 unconstitutional because it failed to substantially advance a legitimate state interest. In so holding, the Court of Appeals invoked the "essential nexus" test utilized by this court *in Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, ____U.S.____, 114 S.Ct. 2309 (1994). App. 7a-14a.

The petitioners assert that the nexus test is inapplicable where the constitutionality of a statute of general application is challenged. Instead, the petitioners claim that the nexus test only applies where the state, in an individualized zoning determination, exacts an easement in exchange for granting a permit. On this basis, the petitioners argue that certiorari is required so that the Court can "clarify" the limits of *Nollan* and *Dolan*. State Pet., Point I; Lenox Hill Pet., Point II. For the reasons set forth below, such clarification is unnecessary.

There can be little question that the nexus test applies to the instant case, as the Court of Appeals expressly found. App. 9a-10a. Dispositive of this issue is *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). In *Yee*, the petitioner challenged a statute of general application which, in effect, allowed a pre-existing rent regulated tenant to sell his or her statutory rights to an incoming tenant. The petitioner alleged that the transfer of wealth from the landowner to the tenant constituted a physical taking. The Court rejected this argument, but observed that the

nexus test would apply to a regulatory takings claim relating to a statute of general application. The Court stated:

> "petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. See, *Nollan v. California Coastal Comm'n*, supra, at 834-85."

118 L.Ed.2d at 167 (emphasis in original).

The applicability of the nexus test to the instant case is also evident from *Nollan* itself. In *Nollan*, the Court cited *Agins v. Tiburon*, 447 U.S. 255 (1980) and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) as the genesis for the nexus test. 483 U.S. at 834. Both cases involved a challenge to a statute or ordinance of general application. Notably, the Court stated in *Agins* that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ...." 447 U.S. at 260 (emphasis supplied).

More to the point, the *Nollan* majority held that the nexus test was appropriate for all challenges under the Takings Clause, and rejected as inapplicable the minimal scrutiny, excessive deference standard utilized in equal protection and substantive due process claims:

> "Contrary to Justice Brennan's claim ... our opinions do not establish that

> these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that 'the State could rationally have decided that the measure adopted might achieve the State's objective'... [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical."

483 U.S. at 834-35, n. 3.

Dolan also rebuts the petitioners' argument that the nexus test is limited to individualized zoning determinations. *Dolan* further refined the *Nollan* nexus test by defining the required degree of connection between governmental ends and means. In settling on the "rough proportionality" test, the Court approvingly cited six state court decisions which had utilized this standard. 114 S.Ct. at 2319. Notably, five of those cases involved constitutional challenges to statutes or ordinances of general application. See, *Simpson v. North Platte*, 206

Neb. 240, 292 N.W.2d 297 (1980); *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *College Station v. Turtle Rock Corp.*, 608 S.W.2d 802 (Tex. 1984); *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979).

The petitioners' arguments defy common sense as well as precedent. The petitioners concede that the nexus test applies where a landowner seeks a governmental benefit but is required to give an exaction as a *quid pro quo*. If this is true, then the nexus test must also apply where, as here, a condition is imposed by governmental fiat on a hapless owner who has sought nothing in return.

The petitioners' claims regarding the proper standard for deciding this case are moot because the Court of Appeals determined that ch. 940 actually defeated the primary goals of the Rent Stabilization Law. Thus, ch. 940 cannot possibly satisfy whatever toothless "rationality" standard the petitioners would prefer. Where an enactment contravenes a legitimate state interest, even minimal scrutiny will be sufficient to justify a declaration of unconstitutionality.

Lenox Hill attempts to shoehorn its petition into Rule 10.1(b) by claiming that there is a conflict among state and federal courts as to whether the nexus test can be applied in cases involving a statute of general application. Lenox Hill Pet., at p. 17. The "conflict," however, is more apparent than real. *Waters Landing Ltd. Partnership v. Montgomery County*, 337 Md. 15, 650 A.2d 712 (1994) concerned the constitutionality of a tax, and did not implicate the Takings Clause. *Id.* at 18. In *Parking Association of Georgia, Inc. v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), the

Supreme Court of Georgia, citing *Dolan*, ultimately concluded that "the city demonstrated 'rough proportionality' between the requirements and objectives of the ordinance." Id. at 766, n. 3. In *Carson Harbor Village Ltd., v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), the Court mentioned *Nollan* and *Dolan* in passing, primarily in the context of standing. Id. at 476-77.

In Point III of its brief, Lenox Hill invokes the infamous *Lochner* doctrine, claiming that the Court of Appeals improperly second guessed the Legislature's judgment relating to the wisdom of ch. 940. In fact, the Court of Appeals did nothing more than exercise its proper judicial function of determining whether a statute had violated the Takings Clause.

Stripped of its rhetoric, Lenox Hill's primary complaint is that it disagrees with the Court of Appeals' assessment of the underlying goals of New York City's Rent Stabilization Law, and its ultimate conclusion that ch. 940 contravened those goals. Lenox Hill's proposed remedy for the alleged *Lochner* violation is to have this Court second guess the New York Court of Appeals as to the proper interpretation of the Rent Stabilization Law. As noted earlier, a determination by New York State's highest court regarding the nexus between the means and ends of a New York statute is a unique state law determination to which, upon a negative finding, this Court should defer.

In Point I of its brief, Lenox Hill apparently asserts that no regulatory taking could have occurred in the instant case unless ch. 940 resulted in a physical taking of the respondent's property, or adversely impacted on the respondent's investment-backed expectations. In fact, as *Nollan* and *Dolan* establish, a regulatory taking will occur where a regulation fails to substantially

advance a legitimate state interest, or denies an owner economically viable use of its property. Notably, this Court found a regulatory taking in *Hodel v. Irving*, 481 U.S. 704 (1987), despite labelling as "dubious" the landowners' claim that the regulation in question had diminished their investment-backed expectations. *Id.* at 715.

Lenox Hill apparently asserts that as long as a regulation can be classified as "economic" in nature, the government's ability to regulate land is virtually unrestricted. This argument, however, was expressly rejected in *Dolan*:

> "Justice Stevens' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are 'a species of business regulation that heretofore warranted a strong presumption of constitutional validity.' *Post*, at 2325. But simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenges on the ground that it violates a provision of the Bill of Rights.
>
> * * *
>
> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."

114 S.Ct. at 2320.

One last point should be made. In two prior post-*Nollan* cases, the New York Court of Appeals has applied the nexus test to constitutional challenges of a statute or regulation of general application. See, *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (1989) and *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156 (1993). In both instances, this Court refused to grant certiorari relief. *Wilkerson v. Seawall Assocs.*, 493 U.S. 976 (1989); *Rent Stabilization Ass'n v. Higgins*, _____U.S._____, 114 S.Ct. 2693 (1994).

III

The Court of Appeals Considered -- and Rejected -- Lenox Hill's Claim That Ch. 940 Provided Just Compensation

In Point IV of its petition, Lenox Hill asserts that the Court of Appeals erred as a matter of law by failing to determine whether ch. 940 provided the respondent with just compensation. Lenox Hill then asserts that certiorari is required to determine "[w]hether a statute can be invalidated as a regulatory taking without consideration of the just compensation issue." Lenox Hill Pet., at p. 24. Petitioner the State raises no similar claim.

Lenox Hill's contrived argument should be rejected out of hand. Lenox Hill concedes that it "asserted below that even assuming *arguendo* that Chapter 940 constituted a sufficient impairment of the landlord's interest to warrant consideration of the just compensation issue ... the legislation nevertheless afforded the landlord just compensation." Id. at pp. 23-24. The fact that the Court of Appeals considered this argument, and rejected it *sub silentio,* is not a basis for granting certiorari. It was not incumbent upon the Court of Appeals to explicitly reject every claim made by Lenox Hill below.

The Court of Appeals remitted the case for "such further proceedings as may be necessary and appropriate to resolve rights and remedies among the parties to this litigation affected by the holding of this case." App. 16a. Among the issues to be decided is the just compensation due the respondent. In this respect, State court proceedings have already commenced. See, *Manocherian et al. v. State of New York,* Ct. of Claims, Claim No. 91018.

CONCLUSION

For all of the foregoing reasons, the petitions for a writ of certiorari should be denied.

Dated: New York, New York
April 17, 1994

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LENOX HILL HOSPITAL,
A NEW YORK NOT-FOR-PROFIT CORPORATION,

Petitioner,

—v.—

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN, AND BARBARA MANOCHERIAN, D/B/A FAME COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

LENOX HILL HOSPITAL, A NEW YORK NOT-FOR-PROFIT CORPORATION, *Petitioner*,

—v.—

AMIR MANOCHERIAN et al., *Respondents*.

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PRELIMINARY STATEMENT

Respondents' opposition sets forth three arguments to the petition for a writ of certiorari in this case: 1) the New York State Court of Appeals decision is not final within the meaning of 28 U.S.C. § 1257(a) (1994); 2) the Court of Appeals applied the proper standards below; and 3) the Court of Appeals did consider and implicitly reject the argument of petitioner Lenox Hill Hospital ("Lenox Hill" or "the Hospital") that 1984 N.Y. Laws 940 ("Chapter 940") affords the respondents just compensation. Respondents' interpretation of the Court of Appeals' opinion is untenable and contrary to applicable law. For these reasons, and for the reasons stated in the petition, none of those arguments has merit, and a writ of certiorari should be granted.

I.

THE UNITED STATES SUPREME COURT HAS JURISDICTION TO REVIEW THIS CASE UNDER 28 U.S.C. § 1257(a)

The New York State Court of Appeals decision grants judges, in the name of the Constitution, far more power to strike down economic regulation that does not effect a physical taking than

any that has been recognized in recent decades. This Court has jurisdiction to hear this appeal and to grant a writ because New York's highest court has struck down a state statute on federal constitutional grounds, and its decision — if left standing — will cause immediate damage to the ability of legislatures to enact and have implemented legislation of general applicability. This Court has repeatedly held that it has jurisdiction in those circumstances, so that, if the construction of federal law relied on by the state courts to strike down state legislation is improvident, this Court can so hold and "disabuse" state courts of any "erroneous view" of federal law that has led to the invalidation of duly enacted legislation.

Respondents assert that the petition should be denied as the Court of Appeals' decision was not final within the meaning of 28 U.S.C. § 1257(a). Conceding that the first three elements of the fourth exception noted in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), are satisfied,[1] respondents contend that the fourth element is not, which provides for functional finality where "a refusal immediately to review the state-court decision might seriously erode federal policy . . . ." 420 U.S. at 482-83. Respondents' argument that no federal policy within the meaning of *Cox* is at stake is clearly wrong.

This Court has repeatedly, and properly, found a compelling federal policy of ensuring that judicial invalidation of state statutes on federal grounds be exercised no more broadly than federal law properly construed authorizes. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (strong policies support review of state court judgments when it appears that "the state

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[1] To use the phrasing of *Cox*, "[1] the federal issue has been finally decided in the state courts [2] with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds . . . and [3] where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of . . . the state proceedings . . . ."

court decided the case the way it did because it believed that federal law required it to do so"); *Arizona v. Evans*, ___ U.S. ___, 115 S. Ct. 1185, 1189 (1995) (a state's freedom is enhanced when the Supreme Court exercises jurisdiction to "disabuse [ ] [a state court] of its erroneous view of what the United States Constitution requires"). Accordingly, this Court has repeatedly construed § 1257(a)'s finality requirement to decide important federal questions concerning the interpretation of the Constitution. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989) ("Adjudicating the proper scope of First Amendment protections has often been recognized by this court as a 'federal policy' that merits application of an exception to the general finality rule"); *Cox*, 420 U.S. at 485-86 (reviewing the invalidation of a state statute, despite the non-finality of the state decision, as it implicated important First Amendment interests); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 (1974) ("it would be intolerable to leave unanswered . . . an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the challenged state statute] could only further harm the operation of a free press"). This appeal implicates similarly important constitutional issues.[2]

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[2] Respondents' reliance on *Flynt v. Ohio*, 451 U.S. 619 (1981), is misplaced. *Flynt* did not involve the constitutionality of a statute of general application, but rather whether, on the facts of this particular case, state officials had engaged in "selective and discriminatory" prosecution. Given the fact-intensive nature of the review sought, there was little question that immediate review would have little impact beyond the two individual defendants in the case, and therefore no broad federal policies were immediately implicated. In contrast, the Court of Appeals' decision has far-ranging implications for any legislature contemplating enactment of regulations that may implicate property interests, and arms state courts with a greater power to invalidate state legislation on Takings grounds than they have previously enjoyed.

At issue in this case is the whether the close causal nexus test, first expressed in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and further developed with the burden-shifting rough proportionality standard enunciated in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994), should be applied outside the site-specific administrative context and used by the judiciary to invalidate duly enacted legislation of general application. This is clearly an important federal question which will have a broad impact on future interpretations of the Takings Clause of the Fifth and Fourteenth Amendments to the Constitution, as well as on the ability of legislatures to enact legislation without having to make express legislative findings justifying their enactments, and to have that legislation implemented without being invalidated under the demanding and in this context inappropriate *Dolan* standards.[3]

II.

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS IMPROPERLY IMPOSED AN AFFIRMATIVE BURDEN ON THE LEGISLATURE TO JUSTIFY DULY ENACTED LEGISLATION

Respondents claim that the Court of Appeals properly applied the "close causal nexus" standard by imposing upon the legislature an affirmative burden of justifying duly enacted regulations, and by, in the words of dissenting Judge Levine, "pick[ing] and choos[ing] among the express purposes of legislation in employing the test of whether the requisite

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[3] Respondents' attempts to categorize this case as "a unique state law determination," Resp. Br. pp. 15-16, ignores the fact that the Court of Appeals decision (1) clearly imposes upon legislatures an affirmative burden to justify legislation affecting property interests and (2) clearly provides that economic regulatory legislation may be struck down unless it passes muster under *Dolan*. Contrary to respondents' contentions, this case does not require complicated interpretations of New York's Rent Stabilization scheme, but rather the application of developing and general principles of the Takings Clause.

connection exists between the particular regulation and the problems the Legislature sought to ameliorate." Pet. App. 25a.

Respondents' argument seems to based in a fundamental confusion as to the test to be applied in takings challenges to statutes of general application. They erroneously equate the "substantially advance legitimate state interests" analysis set forth in *Agins v. Tiburon*, 447 U.S. 255 (1980) and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), with the "close causal nexus" and "rough proportionality" standards set forth in *Nollan* and *Dolan*. The test of *Agins* and *Penn Central* applies to all legislation challenged under the Takings Clause, from legislative enactments like Chapter 940 to the conditional granting of development permits at issue in *Nollan* and *Dolan*.

By contrast, Judge Levine contended in dissent and we believe that *Dolan*'s close causal nexus and rough proportionality standards apply only to takings challenges of the conditional grant of development permits. Regardless of whether the "rough proportionality" standard of *Dolan* was drawn in part from state court decisions invalidating statutes of general applicability, this Court in *Dolan* made clear that, as a constitutional standard, the "rough proportionality" test was not to be applied so broadly. The Court in *Dolan* expressly distinguished between "essentially legislative determinations classifying entire areas of the city" and "adjudicative decision[s] to condition petitioner's application for a building permit on an individual parcel," *Dolan*, 114 S. Ct. at 2316, and imposed the rough proportionality test to the latter cases only. As Chapter 940 plainly falls in the former line of cases, the Court of Appeals' application of *Nollan* and *Dolan* was improper. Applying *Dolan* to regulatory statutes that do not result in physical takings renders it indistinguishable from the "discredited, pre-Depression version of substantive due process." *United States v. Lopez*, No. 93-1260, 1995 U.S. LEXIS 3039, *94 (Apr. 26, 1995) (Stevens, J., dissenting).

It is not surprising that respondents may be confused by the application of these two separate standards; many courts have confused the scope of these tests as well. In addition to those

cases cited in the petition, Pet. 17, two cases decided just this month (and after the petition had been filed) continue to muddle the *Nollan* and *Dolan* standards. In *Sarasota County v. Taylor Woodrow Homes Ltd.*, No. 94-01381 1995 Fla. App. LEXIS 3571 at *11-12 (Fla. Dist. Ct. App. Apr. 7, 1995) (citations omitted), the court clearly understood that *Dolan* only applies to the imposition of conditions on a permit:

> We recognize the recent line of cases holding that the government cannot compel a person to give up a constitutional right to property in exchange for a discretionary benefit where the property sought has little relationship to the benefit. *[See Dolan v. City of Tigard; Nollan v. California Coastal Comm'n.]* Likewise we understand that a county cannot condition the issuance of a permit upon a specific condition without establishing an essential nexus between that condition and a legitimate state interest. *Dolan*. In addition to this essential nexus, a county that conditions a permit upon a dedication of private property is now required to make an individualized determination that there exists a "rough proportionality" between the dedication and the nature and extent of the impact of the proposed development. *[Dolan]*; *see Lee County v. New Testament Baptist Church of Fort Myers, Fla., Inc.*, 507 So. 2d 626 (Fla. 2d DCA), *review denied*, 515 So. 2d 230 (Fla. 1987).

However, in *Templeton Coal Co. v. Shalala*, TH 93-158-C-T/H, 1995 U.S. Dist. LEXIS 4419 at *67 n.12 (S.D. Ind. Apr. 4, 1995), the district court asserted that the nexus test of *Dolan* might apply to a takings challenge to a federal statute (although it proceeded to hold that the legislation passed this test). Clearly, confusion amongst both practitioners and the courts as to when

and whether the *Dolan* and *Nollan* standards should apply continues to build.[4]

III.

THE COURT OF APPEALS DID NOT ADDRESS WHETHER CHAPTER 940 AFFORDED JUST COMPENSATION

Contrary to respondent's say-so, it could not be plainer that the Court of Appeals never addressed whether Chapter 940 afforded the respondents just compensation for the alleged taking. Rather, the Court found Chapter 940 to be an unconstitutional taking and *per se* impermissible:

> The sharply focused legal question under the controlling precedential and analytical principles may be reduced simply to whether the legislation is supported by a substantial State interest and close nexus. No amount of extensive and virtually exclusive exploration of economic recalibration of the test, as an expectation for the future, can change that

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[4] *Yee v. City of Escondido*, 503 U.S. 519 (1992), heavily relied on by Respondents, does not clarify the issue. In *Yee*, this Court, after determining that the challenged rent control ordinance did not constitute a physical taking, remanded the case to determine whether a regulatory taking had occurred. In dicta, this Court indicated that there would have to be a determination of whether a "sufficient nexus" existed between the statutory purpose and its application. *Id.* at 519. The Court never indicated that this nexus must be a "close causal nexus." It merely indicated that the petitioners had appropriately claimed that the statute did "not '"substantially advance"' a '"legitimate state interest."'" *Id.* (citations omitted). Had the Court of Appeals applied that standard in this case, it would have found, as did the Appellate Division and State Supreme Court, that Chapter 940 advances the legitimate purposes of New York's Rent Stabilization scheme sufficiently to withstand challenge as a regulatory taking, or as a deprivation of property without due process of law.

> central controlling feature under reasonably clear precedents and principles. . . . The Constitution forbids State action by fiat, no matter what the economic equation.

Pet. App. at 16a. Not one word in the Court of Appeals' opinion examines whether the additional 15% rent increases granted by Chapter 940 afforded the respondents just compensation so as to preclude a finding that the Takings Clause was violated (which requires, as this Court has repeatedly said, not only a "taking" but one "without just compensation"). To the contrary, the decision plainly invalidates the statute as an unconstitutional taking outright, regardless of the benefits offered the Manocherians by the extra rent increases, finding it not closely-enough tailored to the purposes of the original rent stabilization laws. Having invalidated the statute outright, the Court of Appeals could not and did not remand the case for a determination of the compensation issue.[5] This issue would independently justify granting a writ of certiorari.

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[5] The Court of Claims action subsequently filed by the Manocherians has no relevance to Lenox Hill's rights under the now-invalidated statute (which have been finally determined and conclusively lost, unless this Court reverses) or to the case at hand. At issue in the Court of Claims action is not whether Chapter 940 afforded the Manocherians enough compensation so as to render that statute constitutional and leave Lenox Hill with its rent stabilized leases (a judgment the Court of Claims is not free to reach), but rather only the compensation they may obtain from the state for the occupation that occurred before the Court of Appeals declared Chapter 940 unconstitutional in this case.

CONCLUSION

For these reasons, and the reasons set forth in the petition the Court should grant the petition for a writ of certiorari.

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